Trial of Pitambar Bose and Joykissen Mookherjee, 1863 - Part-II

Judicial administration / Civil justice / Trials

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To

THE SECRETARY TO THE GOVERNMENT OF BENGAL.

SIR,

I HAVE the honor to enclose a Petition to the Queen's Most Excellent Majesty, in which I pray for a full pardon, which alone can completely free me from the consequences of the conviction recorded against me on the prosecution of Kallykisto Roy Chowdory.

It seems to me that as the case was originally referred by the Secretary of State in Council of India to the Government of India, and by the Government of India to the Lieutenant Governor of Bengal, that the proper channel for transmitting my Petition to Her Majesty lies through the Government of Bengal to the Government of India, and so through the Secretary of State in Council of India to the Throne.

This course will afford an opportunity for each of the several Officers who have already considered my case to accompany the Petition with such remarks as may appear to be necessary.

I have, therefore, the honor to request that you will, with the permission of His Honor the Lieutenant Governor, transmit the enclosed Petition, with all the papers connected with my case, among which I request may be included the Petitions presented to the Lieutenant Governor on my behalf by the inhabitants of the zillah of Hooghly and of Calcutta and the Minute of the Lieutenant Governor recorded on the 20th of January last, to the Government of India, with a request on my part that they may be forwarded to the Secretary of State in Council of India for submission to Her Majesty through the proper Officer of State.

I have, &c.,

JOYKISSEN MOOKERJEE.

CALCUTTA,
~~15th November 1863.~~
31st December,
1863

To

THE QUEEN'S MOST EXCELLENT MAJESTY.

The humble Petition of Joykissen Mookerjee, a Hindoo Inhabitant of Bengal.

SHEWETH,

THAT on the 31st of March 1862 your Petitioner was convicted by the Sudder Nizamut Adawlut at Calcutta (for whose decision the case had been referred in consequence of a difference of opinion between the Sessions Judge, before whom your Petitioner had been tried, and the Mahomedan Law Officer who sat with the Judge on the trial, the former of whom considered your Petitioner innocent and the latter guilty) upon a charge of having procured the forgery of a Pottah or Lease, and your Petitioner was sentenced to five years' imprisonment with labor, the labor commutable for a fine of 10,000 Rupees.

That your Petitioner, who was at large on bail at the time of his conviction surrendered himself to undergo his sentence of imprisonment and paid the fine of 10,000 Rupees in place of being put to hard labor.

That your Petitioner while in Jail undergoing his sentence presented his humble Petition to your Most Excellent Majesty in Council, praying that your Majesty in Council would be pleased to order that your Petitioner should have special leave to appeal from the said conviction, judgment and sentence of the Sudder Nizamut Adawlut.

That your Petitioner craves reference to his said Petition to your Majesty in Council (a copy whereof is hereto annexed) wherein he has set forth at length the grounds upon which he seeks to impugn the said conviction as illegal, and has briefly alluded to some of the main points which distinguish his case from those of ordinary criminal prosecutions and tend to impeach the correctness of the said conviction uponthe merits.

That your Petitioner's said Petition for leave to appeal was heard by the Judicial Committee of the Privy Council upon three different days, whereupon the said Committee, on the 16th of July 1862, thought proper, upon considerations affecting the general administration of Criminal Justice in the Colonies, to advise your Majesty that your Petitioner's application should be refused: but their Lordships in delivering their judgment (a copy of which your Petitioner has hereto annexed) were pleased to make the following remarks:—"With regard to the merits of the case itself their "Lordships certainly are inclined to come to the conclusion that the course of justice "has not been very well administered on the present occasion, and supposing it to "have been a civil case and not a criminal case, they would have had no hesitation what-"ever in recommending to Her Majesty to allow an appeal for the purpose of consider-"ing these proceedings and of doing justice to the party complaining. But this is a "criminal case and subject to very different considerations. Admitting therefore two "things.—Admitting the existence of the Prerogative of the Crown, and admitting that "this is a case of *primâ facie* and presumptive great grievance—their Lordships have now "to determine whether, looking at all the circumstances attending the granting of "appeals in criminal cases, it would be their duty to advise Her Majesty to grant the "appeal or to withhold it." And again—"These are the reasons which operate on our "minds in rejecting this application, not at all forgetting that injustice may have been "done in this individual case: and not at all forgetting that the Power of the Crown

" may be invoked in another shape, and that that injustice may be remedied. Their " Lordships are of opinion that they cannot, under the existing circumstances, advise Her " Majesty to exercise this right of appeal; but they doubt not that justice may be done; " because they would suggest that an application should be made to the constituted " Authorities who have the power to afford a remedy though in a different way. They " doubt not that, when it is represented to those Authorities that this suggestion emanates " from the Judicial Committee, they will not be loth to examine into the circumstances " of the case and to do that which justice may require."

That a copy of the Judgment of the Judicial Committee was forwarded by the Registrar of the Privy Council to the Secretary of State for India.

That your Petitioner through his Counsel, acting upon the suggestion of the Judicial Committee, petitioned your Most Excellent Majesty for pardon, which Petition was forwarded to the Secretary of State for India in Council, who referred the matter to the Government of India.

That the Government of India in the Home Department, by an order dated the 20th of October 1862, forwarded the despatch of the Secretary of State to the Lieutenant Governor of Bengal with an order desiring the Lieutenant Governor to make a special report to the Governor General in Council of the conclusion to which he might arrive, and the reasons of it.

That the Lieutenant Governor of Bengal forwarded the papers sent to him by the Government of India to the High Court of Judicature at Fort William in Bengal, with a letter dated the 6th of November 1862, in which he requested the Judges of the High Court to favor him with such remarks as they might desire to make, and to furnish him with their opinion whether, with reference to all the circumstances of the case and especially to the Judgment of the Privy Council and the opinion of the Lord President, as conveyed in the letter of the Registrar, there was ground for pardoning your Petitioner, or for remitting the remainder of his punishment.

That on the 20th of January 1863, a period of upwards of nine weeks having elapsed since the papers of the case had been sent to the High Court, and no opinion or reply having been received by the Lieutenant Governor from that Court or any of the Judges thereof, and two Petitions numerously signed by the leading Zemindars of Hooghly (the zillah in which your Petitioner resides) and of Calcutta, praying for your Petitioner's release, having meanwhile been received by the Lieutenant Governor, the Lieutenant Governor was pleased to remit the remainder of the punishment of imprisonment awarded to your Petitioner, and to direct your Petitioner's immediate release, observing that it would be open to him to reconsider the case, with a view to determine whether your Petitioner should or should not be pardoned, when the reply of the High Court should have been received.

That your Petitioner, having waited until the reply of the High Court had been received by the Lieutenant Governor, petitioned the Lieutenant Governor for a free pardon and for a refund of the fine of 10,000 Rupees paid by your Petitioner in lieu of the punishment of hard labour which had been remitted, but the Lieutenant Governor refused to accede to your Petitioner's prayer.

That the Lieutenant Governor has dealt with the case of your Petitioner under the powers conferred upon him by Act XVIII. of 1855 of the Indian Legislature, passed with the sanction of your Most Excellent Majesty previously obtained, whereby it is declared that " the person or persons for the time being authorized to administer the " Supreme Executive Government in any Presidency or place within the Territories in " the possession and under the Government of the East India Company, have power to

" grant pardons and reprieves in respect of any crime or offence committed within such " Presidency or place, or to remit the whole or any part of the punishment awarded in " respect of any such crime or offence, whether the same be awarded by any of Her " Majesty's Supreme Courts of Judicature or by any other Court or Officer exercising " jurisdiction within the said Territories." But by the same Act it is declared that " no- " thing in this Act shall be construed to interfere with the undoubted right of Her " Majesty to grant pardons or reprieves or remissions of punishment in any of the cases " above mentioned."

That your Petitioner in consequence ventures to approach your Most Excellent Majesty, in the hope that you may be graciously pleased to exercise in his case that prerogative of mercy from a resort to which none of your Majesty's subjects are cut off.

That your Petitioner has been refused a copy of the Minute in which the Lieutenant Governor recorded his reasons for remitting the remainder of the sentence of imprisonment passed upon your Petitioner, but has been furnished with copies of the Minutes of the Hon'ble the Chief Justice and the Judges of the High Court made upon the case of your Petitioner when referred to them by the Lieutenant Governor as aforesaid. Copies of these Minutes he begs to annex.

That your Petitioner has been furnished with an extract from the Minutes of the Lieutenant Governor dated the 2nd February 1863 recorded after His Honor had read the Minutes of the Judges of the High Court upon the case of your Petitioner, a copy of which extract your Petitioner has hereto annexed. Your Petitioner begs leave to remark that, although in this Minute the Lieutenant Governor has recorded his opinion that " he is by no means satisfied either that any reasonable doubt has been cast " on the real guilt of the prisoner, or that he was materially prejudiced in his defence " by the irregularites of procedure," and has also stated that " he agrees with those of " the Judges of the High Court who do not advise that the prisoner should be " pardoned so far as to think that he is morally guilty of the crime of which he has been " convicted," yet, as neither the Lieutenant Governor nor the Judges of the High Court whose opinion was sought by His Honor perused the evidence upon which your Petitioner was convicted, the question as to the moral guilt of your Petitioner rests exactly as it was when the suggestion was given by the Judicial Committee of the Privy Council that an application for pardon should be made by your Petitioner as aforesaid.

That your Petitioner begs to call attention to the fact that throughout the elaborate Minutes of the Judges of the High Court not a single remark occurs impugning the accuracy of any one of the statements contained in your Petitioner's Petition originally presented to the Judicial Committee of the Privy Council. Your Petitioner cannot therefore but confidently hope that your Most Excellent Majesty will attach very great weight to the opinion expressed by the Lords of the Privy Council that that Petition (now shown to be in every particular true) disclosed a case of *primâ facie* and presumptive great grievance, and to the intimation of their inclination to come to the conclusion that the course of justice had not been very well administered on the present occasion. Your Petitioner is informed that it would have been contrary to the etiquette observed by tribunals so dignified as the Judicial Committee of the Privy Council to have expressed an opinion more positive than that recorded in their Judgment upon the mere *exparte* statements of a Petitioner, and that the intimation of a doubt that justice had been done is equivalent to a direct decision to that effect, now that the correctness of the statements which elicited that intimation has been ascertained.

That your Petitioner ventures to remark that the opinions delivered *seriatim* by the Judges of the High Court upon his case, were obtained in a manner the most likely to make them prove unfavorable to your Petitioner, inasmuch as the opinion of the Chief Justice was the first recorded that opinion was adverse to your Petitioner, as might have been anticipated inasmuch as the two Sudder Judges who originally sat in Judgment on your Petitioner had (as they openly stated) consulted the Chief Justice before adopting in your Petitioner's trial the course to which your Petitioner objected as being illegal The unfavorable opinion of the Chief Justice was, as the Minutes show, circulated to the other Judges in succession, together with the papers on which they were to form an opinion. It is, therefore, not improbable that these Judges would bring to the consideration of the case minds not wholly uninfluenced by the authority of the learned Chief Justice. Notwithstanding this being the case, out of the thirteen Judges who have considered your Petitioner's case, seven have recommended that your Petitioner should be pardoned or the remainder of his sentence remitted, while of the six who have given opinions unfavorable to your Petitioner two were those who had originally convicted your Petitioner, and who were, therefore, likely to adhere to their original opinion notwithstanding the grave doubts of its correctness entertained by the Judicial Committee.

That your Petitioner humbly craves your Majesty's gracious consideration of his case, more especially with advertence to the following facts, *viz.*, that the prosecution which resulted in the conviction of your Petitioner was supported with unsparing malignity and lavish expenditure by your Petitioner's own brother and nephew, that the English Judge who heard the evidence against your Petitioner delivered *viva voce* was originally of opinion that your Petitioner was innocent and adhered to that opinion after the case had been referred back to him for re-trial · that the Judicial Committee of the Privy Council, upon perusal of your Petitioner's Petition of appeal, the correctness of the statements contained in which has now been ascertained, recommended an application for pardon being made; that of the thirteen Judges of the High Court whose opinions were asked by the Lieutenant Governor, seven recommended that your Petitioner should be pardoned or the remainder of his sentence remitted; that several of the most respectable landholders of the Zillah in which your Petitioner resides petitioned the Lieutenant Governor in your Petitioner's favor; that the antecedents of your Petitioner were such as induced the Lieutenant Governor, without waiting for the opinion of the Judges of the High Court, to remit the remainder of your Petitioner's sentence of imprisonment, recording on the occasion a minute in which, as your Petitioner is informed, allusion was made to "the life-long career of public beneficence for which the prisoner is justly held in honor among his countrymen"; that your Petitioner has, since his release from imprisonment, regained his former position and influence in native society, in proof of which is the fact that he has been re-elected as a member of the managing Committee of the British Indian Association, an Association composed of the leading Landholders and Merchants of Lower Bengal, and which is recognised and corresponded with by Government, and also continues to discharge his duties as an active Member of several other public Associations and Institutions; and finally that the remission of punishment without the grant of pardon presents to the mind of the general public an anomaly tending to scandalise justice.

On which grounds among others

Your Petitioner humbly prays that your Most Excellent Majesty would be graciously pleased to grant your Petitioner a full pardon.

And your Petitioner as in duty bound shall ever pray.

JOYKISSEN MOOKERJEE.

CALCUTTA,
1st November 1863.

IN THE PRIVY COUNCIL.

To

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

The Humble Petition of Joykissen Mookerjee, a Hindoo, at present a Prisoner in the Jail at Alipoor in the Province of Bengal.

SHEWETH,

THAT your Petitioner, a Hindoo inhabitant of Bengal, was committed together with one Petumber Bose, on the 23rd of February 1861, by Mr. J. P. Grant, Joint Magistrate of Serampore, to take his trial before the Sessions Court of the Zillah of Hooghly, upon the two following counts or charges—that is to say.—

1*st Count.*—"Fraudulently and injuriously fabricating a written deed of the following purport, viz., an Izarah Pottah, dated 18th Assar 1267 B. S., for one-third of Mokhah for 10 years at a yearly rent of 902 Rs., executed by Meghall Dhur and Doololl Dhur for selves and co-sharcholders to Petumber Bose."

2*nd Count*—"Knowingly and fraudulently uttering the above fabricated Deed by presenting it for registration at the Register's Office, Serampore, on the 2nd July 1860."

2. That the Sessions Court of Hooghly, before which your Petitioner and the said Petumber Bose were committed to take their trial as aforesaid, is a Court established and held under the provisions of Regulation IX. of the year 1793 enacted by the Governor-General of India in Council for the Civil Government of the Territories under the Presidency of Fort William in Bengal entitled, "A Regulation for re-enacting with alterations and modifications the Regulations passed by the Governor-General in Council on the 3rd December 1790, and subsequent dates for the apprehension and trial of persons charged with crimes and misdemeanors" as altered and modified by subsequent Regulations of the same Code.

3. That the trial of your Petitioner and the said Petumber Bose upon the above charges was commenced and proceeded on the 30th of March 1861, and several subsequent days before J. E. S. Lillie, Esquire, Additional Sessions Judge of Hooghly, and Moulvee Fyezoollah, then Mahomedan Law Officer of the Sessions Court of Hooghly.

4. That the case for the prosecution upon the above two charges was opened by Counsel learned in the law, who examined witnesses in support of the said two charges on the 30th of March, and on several subsequent days until the whole evidence for the prosecution had been taken, at which stage of the proceedings Counsel for the prosecution applied to the Judge before whom the trial was held to add a count to the Calendar as against your Petitioner, charging your Petitioner with having caused or procured the forgery of the Pottah described in the two counts above mentioned.

5. That the Judge thereupon sent the Calendar to the Committing Magistrate, with an order directing him to add the count against your Petitioner as applied for by Counsel for the prosecution, and to recommit your Petitioner for trial upon such additional charge.

6. That the Magistrate, in compliance with the orders of the Judge, amended the Calendar by adding the following count or charge—that is to say—

3*rd Count*—"Against Prisoner No. 1 (your Petitioner) causing or procuring the forgery of the Pottah above described. J. P. G." The initials J. P. G. being those of the Committing Magistrate.

7. The Magistrate sent back the Calendar amended as above to the Court of the Additional Sessions Judge.

8. That during the whole interval between the time of the Calendar being sent to the Magistrate for amendment as above, and of its being returned to the Court of the Additional Sessions Judge, your Petitioner with his Counsel as well as the prosecutor with his Counsel remained in the Court of the Additional Sessions Judge That your Petitioner was never taken before the Magistrate on the said third or additional charge, nor did the prosecutor or any of his witnesses attend before the Magistrate to prefer the said charge. That your Petitioner was never examined before the Magistrate on the said charge, nor called upon to answer the same, nor was any opportunity given to your Petitioner for producing evidence before the Magistrate to rebut the said charge. That your Petitioner was never committed for trial nor held to bail upon the said charge, nor was in any manner charged or indicted thereon save only by the addition thereof to the Calendar under the initials of the Magistrate during the absence of your Petitioner.

9. That after the Calendar, with the addition above described, had been returned to the Court of the Additional Sessions Judge, your Petitioner was called upon to plead and pleaded "Not Guilty" to all the counts of the amended Calendar.

10. That after your Petitioner had so pleaded, no witness whatever was examined for the prosecution; but your Petitioner and the said Pitumber Bose proceeded to examine their witnesses, after which a written defence was put in on the part of your Petitioner and of Petumber Bose, to which the learned Counsel for the prosecution replied, whereupon on the 4th day of May 1861 the Mahomedan Law Officer delivered his Futwa or opinion, whereby he found that the first and second counts of the Calendar had been established against the Prisoner Pitumber Bose, but not against your Petitioner, and that the third or additional count had been established against your Petitioner.

11. That on the 6th day of May 1861 the Additional Sessions Judge convicted the prisoner Pitumber Bose on the first and second counts of the amended Calendar, but disapproved of the finding of the Mahomedan Law Officer on the said third or additional count, and proceeded, in accordance with the provisions of Section 53 of Regulation IX. of 1793 of the Bengal Code, to complete the trial and transmit to the Nizamut Adawlut, established by the said Regulation as altered and modified by subsequent regulations of the same Code, a copy of all the proceedings and the Futwa of the Law Officer with a separate letter, stating the grounds of his disapproval, and awaited the sentence of the said Nizamut Adawlut. That at the same time the prisoner Pitumber Bose appealed to the Nizamut Adawlut from the sentence passed upon him by the Additional Sessions Judge, who had concurred with the Mahomedam Law Officer in convicting him on the first and second counts of the Calendar.

12. That upon the case so transmitted as aforesaid coming on for trial before the Nizamut Adawlut, your Petitioner's Counsel took objection to the proceedings of the Additional Sessions Judge in sending back the Calendar to the Magistrate with orders to add another charge as against your Petitioner and proceeding to try the said charge upon the same record with those originally preferred against your Petitioner and said Pitumber Bose, but contended that as the trial had been held and completed on the said third or additional charge without any evidence having been called for the prosecution upon the said charge, your Petitioner was entitled to be acquitted on the said charge; but the said Nizamut Adawlut disallowed the objection and contention of your Petitioner's Counsel, and on the 9th of July 1861 passed an order as follows:—
"We remit the record to the Sessions Judge with directions that he will retake the evidence of the witnesses as to the third count in proper legal form, and having conducted the whole trial on that count with the assistance of the Law Officer who sat with him, if he be still there, and if not with his successor, pass on the Prisoner No. 1, Joykissen

Mookerjee, whatever sentence may eventually seem just and proper. As, however, the charge against the prisoner No. 1 cannot be substantiated unless the sentence passed by the Sessions Judge against prisoner No. 2, who has appealed, be confirmed, the Court proposes to hear and determine that appeal before the order relating to prisoner No. 1 be allowed to issue."

13. That your Petitioner, on the 9th of November 1861, applied to the Sudder Nizamut Adawlut to review its said order of the 9th of July 1861, but the said Court rejected such application, and resolved that its order of the 9th of July 1861 should issue in due course.

14. That the said Sudder Nizamut Adawlut, after hearing the appeal of the said Pitumber Bose, convicted him of the crime of uttering a forged Pottah knowing it to be forged, and sentenced him to be imprisoned with labour and irons for five years.

15. That thereupon the said order passed on the 9th day of July 1861 issued, being dated the 27th of September 1861.

16. That your Petitioner being thus compelled to undergo his trial upon the said charge of having caused or procured the forgery of a Pottah resolved to avail himself of the privilege conferred by Regulation VI. of 1832 of the Bengal Code upon all persons not professing the Mahomedan faith, by the 5th Section of which Regulation it is declared "That any person not professing the Mahomedan faith when brought to trial "on a commitment for an offence cognizable under the general Regulations may claim "to be exempted from trial under the provisions of the Mahomedan Criminal Code, and "in such case the Commissioner of Circuit or Judge of Sessions presiding on the trial shall "comply with such requisition and shall proceed in one of the three modes referred to in "Section IV of this Regulation, at the same time dispensing with the Futwa of the "Mahomedan Law Officer." And your Petitioner accordingly, on the 13th day of November 1861, filed his Petition in the Court of the Additional Sessions Judge of Hooghly, claiming to be exempted from trial under the provisions of the Mahomedan Criminal Code on his then approaching trial upon the said charge of having caused or procured the forgery of a Pottah, the same being an offence cognizable under Clause 3, Section 4 of the General Regulation 2 of 1807 of the Bengal Code.

17. That your Petitioner having filed his said Petition, being advised that the Additional Sessions Judge in dealing with the same might feel himself embarrassed by the said order of the Sudder Nizamut Adawlut of the 9th of July 1861, whereby the Judge was fettered in a manner which your Petitioner was advised was wholly unprecedented and illegal as to the mode of conducting the coming trial, applied by Petition to the said Sudder Nizamut Adawlut to modify the said order of the 9th of July 1861 so far as to leave it open to the Judge who had to try your Petitioner to use his own discretion on application made before him as to the mode of proceeding to be adopted at the trial of your Petitioner; but the Sudder Nizamut Adawlut rejected your Petitioner's application and refused in any manner to modify the Court's said order of the 9th of July 1861.

18. That before the Record remitted to the Court of the Additional Sessions Judge as aforesaid reached that Court, the said Moulvee Fyezoollah, who had sat as Mahomedan Law Officer upon the trial of your Petitioner and Petumber Bose, had resigned his appointment as Law Officer of the Sessions Court of Hooghly, and had been appointed a Deputy Magistrate in the Zillah of Jessore, which latter appointment he had joined.

19. That before your Petitioner filed his Petition in the Court of the Additional Sessions Judge, claiming exemption from trial under the Mahomedan Criminal Law, that Officer had, on the 30th of September 1861, addressed a letter to the Register of

the Sudder Nizamut Adawlut, informing that Court of the fact of the removal of the former Law Officer of the Court to another situation, and that no successor had been appointed or was likely to be appointed, and soliciting further instructions.

20. That on receipt of the said letter of the 30th of September 1861 the Register of the Sudder Nizamut Adawlut under the directions of that Court wrote to the Secretary to the Government of Bengal, requesting "that the Law Officer who tried "the case of your Petitioner before with Mr. Lillie might be directed to proceed to "Hooghly and to re-hear the evidence properly taken with that officer when Mr. Lillie "should be prepared to take up the trial."

21. That under orders issued in compliance with the above request, the Officiating Under-Secretary to the Government of Bengal wrote and sent to the said Moulvee Fyezoollah a letter, of which the following is a copy :—

"To Moulvee Fyezoollah,—Deputy Magistrate, Jessore, late Law Officer of Hooghly. Fort William the 7th October 1861.

Sir,—I am directed to request that you will hold yourself in immediate readiness to proceed to Hooghly by dawk at the Government expense, for the purpose of sitting with Mr. Lillie, Additional Sessions Judge of that district, at the re-trial of the case of Joykissen Mookerjee, ordered by the Sudder Court. You will learn from Mr. Lillie when he will be prepared to take up the trial.

I have, &c.,

J. MONRO,

Offg. Under-Secy. to the Govt. of Bengal."

22. That on the 8th of October 1861, before your Petitioner had actually filed his said Petition, claiming exemption from trial under the provisions of the Mahomedan Criminal Law, the Additional Sessions Judge of Hooghly, having been informed by your Petitioner's Counsel of your Petitioner's intention to file such Petition, wrote to the Register of the Sudder Nizamut Adawlut, requesting instructions as to the course of conduct which he should pursue, whether he should dispose of the trial himself with the assistance of a Jury, or should try the case with the assistance of a Jury and refer it to the Nizamut Court for sentence, or should transfer the trial to the Sessions Judge of Hooghly.

23. On the 24th of October 1861, the Additional Sessions Judge of Hooghly was informed by letter from the Register of the Nizamut Adawlut that your Petitioner's claim to exemption "was too late," that "it should have been made before the prisoner "was arraigned on the charge for which he was under trial," and he was directed that "the Court's instructions" (passed in accordance with their resolution of the 9th July 1861) "should be obeyed to the letter."

24. The Additional Sessions Judge passed an order on your Petitioner's Petition of the 13th of November 1861, that it should be placed on the record of the Sessions trial.

25. That on the 11th of December 1861, your Petitioner was brought to trial before the Additional Sessions Judge of Hooghly and the said Moulvee Fyezoollah, who had proceeded to Hooghly in compliance with the orders contained in the said letter of the 7th of October 1861, whereupon before any step was taken in the trial, your Peti-

tioner filed his Petition in the Court of the said Additional Sessions Judge, dated the 11th day of December 1861, whereby, after stating that your Petitioner had presented his Petition on the 13th of the preceding November praying to be exempt from trial under the provisions of the Mahomedan Criminal Code and the orders passed thereon that it should be placed on the record of the Sessions trial, your Petitioner renewed his claim under provisions of Regulation VI. of 1832, to be exempt from trial under the provisions of the Mahomedan Criminal Code on the said charge of causing or procuring the forgery of a Pottah, and prayed that his trial might be proceeded with in one of the three modes referred to in Section IV. of the said Regulation, whereupon the Additional Sessions Judge recorded upon your Petitioner's said last mentioned Petition the following order—

> "The Prayer of the Petitioner being contrary to the express instructions of the Nizamut Adwulut, conveyed to me in the letter of their Register, No. 673, dated the 24th October last, is rejected."

26. That the trial of your Petitioner upon the said charge of having caused or procured the forgery of the said Pottah thereupon proceeded before the Additional Sessions Judge of Hooghly and the said Moulvee Fyezoollah under protest from your Petitioner that the Court so constituted had no jurisdiction to try your Petitioner and lasted till the 23rd of December 1861, witnesses being examined both for the prosecution and defence, and on the last mentioned date the said Moulvee Fyezoollah delivered his Futwa, finding your Petitioner guilty of the charge preferred against him, and on the same day, the Additional Sessions Judge of Hooghly being of opinion that your Petitioner was not guilty of the offence with which he was charged, completed the trial and as before transmitted the proceedings to the Sudder Nizamut Adawlut under Section 53 of Regulation IX. of 1793 of the Bengal Code together, with a letter stating his reasons for disapproving of the finding of the said Moulvee Fyezoollah.

27. That your Petitioner on inspecting the Futwa delivered by the said Moulvee Fyezoollah as aforesaid on the said 23rd day of December 1861, discovered that the same was signed as follows:—"Mahomed Fyezoollah, former Mahomedan Law Officer of the Civil Court of Zillah Hooghly," and that the same had not been given under seal.

28. That your Petitioner having been put upon enquiry by observing that the said Moulvee Fyezoollah did not take upon himself to sign as being at the time of signing actually Law Officer of the Court, discovered that the said Moulvee Fyezoollah, after having vacated his appointment of Law Officer of the Hooghly Court on the occasion of his joining his new appointment of Deputy Magistrate in another Zillah, had never, before assisting at the trial of your Petitioner on the 11th of December and subsequent days, taken the oath of Office as Law Officer of the Hooghly Court as prescribed by the Regulations, and had never been re-appointed Law Officer of the Hooghly Court, nor had any authority to act as such, save only such as might be supposed to be conveyed by the said letter to his address from the Officiating Under-Secretary to the Government of Bengal, dated the 7th of October 1861.

29. That the case referred as aforesaid by the Additional Sessions Judge of Hooghly came on for hearing before the Sudder Nizamut Adwalut on the 7th of February 1862, and was heard on that and several subsequent days, and that on such hearing your Petitioner's Counsel, before proceeding to argue the case upon the merits, raised several preliminary objections, and amongst others, the following:—

> 1st.—That the Sessions Judge exceeded his powers in ordering the Committing Magistrate to alter his Calendar, or to commit or recommit your Petitioner on a new substantive charge.

2*nd*.—That the Judge, when he ordered the recommitment of your Petitioner, did not properly follow the course of proceedings directed by the Circular Order of the Sudder Court, No. 70, dated 14th November 1851, under which he proposed to be acting, the effect of which was to embarrass your Petitioner in his defence inasmuch as two distinct trials were proceeding at one and the same time,—the first on the two original counts, and the second on the third or additional count embracing a new and substantive charge; and your Petitioner was deprived of the opportunity of claiming his right to exemption from trial under the Mahomedan Criminal Code on the said third or additional count.

3*rd*.—That your Petitioner was never properly charged before the Magistrate on the said third or additional count nor examined nor confronted with witnesses in the Magistrate Court upon that charge, and that no such charge was ever in fact made against your Petitioner before the Magistrate nor any witness examined or evidence given before the Magistrate in support of that charge.

4*th*.—That your Petitioner was never in fact committed or held to bail in due form of law to take his trial on the said third or additional count or charge, and that consequently the Sessions Court was without jurisdiction to try your Petitioner upon the charge contained in that count.

5*th*.—That your Petitioner being a Hindoo was entitled to claim and had duly and legally claimed exemption from trial on the said third or additional count under the provisions of the Mahomedan Criminal Code, and that his trial before a Mahomedan Law Officer was consequently illegal and void.

6*th*.—That the said Moulvee Fyezollah had vacated his appointment as Law Officer of the Hooghly Court before your Petitioner was brought to trial upon the said third count in December 1861, and was never duly re-appointed or appointed Mahomedan Law Officer to conduct your Petitioner's trial.

7*th*.—That the said Moulvee Fyezoollah never accepted such appointment or the responsibilities thereof or delivered any Futwa as Mahomedan Law Officer presiding at the trial of your Petitioner.

8*th*.—That the said Moulvee Fyezoollah was incompetent to act as Law Officer on the trial of your Petitioner, he never having taken the proper oath of Office as Law Officer as prescribed by the Regulations.

9*th*.—That the Futwa delivered by the said Moulvee Fyezoollah in December 1861, was informal and void, not having been given under seal as is required by the Regulations.

30. That the Sudder Nizamut Adawlut overruled all the objections raised by your Petitioner's Counsel, and the case as made against your Petitioner on the said third or additional count upon the evidence taken in December 1861, was heard upon the merits before the said Sudder Nizamut Adawlut, which Court, on the 31st day of March 1862, convicted your Petitioner on the said third count and sentenced your Petitioner to five years' imprisonment with labour commutable for a fine of 10,000 Rupees.

31. That your Petitioner, on the 3rd day of April 1862, presented his Petition to the Sudder Nizamut Adawlut, praying leave of the Court to appeal to your Most

Gracious Majesty in your Majesty's most Honorable Privy Council from the above conviction and the several orders above mentioned, whereupon the said Court passed the following Order, that is to say :—

> "This Court is not required nor warranted by law to take any steps in criminal matters which the parties concerned require to have brought before Her Majesty's Privy Council. Any application with that object must be made to the Judicial Committee of the Privy Council direct."

32. That your Petitioner, who was at large on bail at the time of his conviction, has since surrendered himself and is now undergoing his sentence in the Jail at Alipore, and has paid the fine of 10,000 Rupees in place of being put to hard labour.

33. That no Charter, Statute or Regulation exists which in any manner regulates or limits the privilege or right of appeal or the mode of exercising such privilege or right of appeal from the sentences or orders of the Sudder Nizamut Adawlut in criminal matters to your Most Gracious Majesty in your Majesty's Honorable Privy Council.

34. That your Petitioner conceives himself aggrieved by the several orders and proceedings and the conviction above mentioned which he is advised and believes to be objectionable and erroneous on various grounds, and among others upon the following :—

1*st*.—That a Sessions Judge has no power to order a Committing Magistrate to add a new and substantive charge to his Calendar or to commit upon such a charge, the Magistrate not being a Ministerial Officer but being bound to exercise a discretion according to his own conscience as to whether the evidence before him warrants him in committing a person accused before him upon a particular charge. That the Sudder Nizamut Adawlut has ruled in the present case under the Criminal Code in force in the Courts by which your Petitioner was tried, the offence of causing or procuring the forgery of an instrument is a substantive offence distinct from that of forging or uttering a forged instrument, and that no conviction of the crime first mentioned could have been had under the first or second count upon which your Petitioner was originally committed. That the Committing Magistrate has consequently, in compliance with the orders of the Sessions Judge, sent up a charge against your Petitioner which was never preferred before the Magistrate.

2*nd*.—That supposing a Sessions Judge to have the power of directing the Magistrate to commit upon a particular charge, such power was not duly exercised in the present instance. That the Sudder Nizamut Adawlut has distinctly declared that it was the duty of the Sessions Judge, under the Circular Order No 70 of the 14th November 1851, when from the evidence given before him on the first two charges made against your Petitioner he found that those charges were not established by that evidence, at once to have stopped the trial and ordered the recommitment of your Petitioner on the third count in addition to the other two, or to have acquitted your Petitioner on the two counts on which he had been charged and directed his commitment on the third. The trial was not stopped, but your Petitioner was required to plead to a new and substantive charge while his trial on the two former charges was proceeding, the result of which has been to give a pretext for depriving your Petitioner of his right to claim exemption from trial according to the provisions of the Mahomedan Criminal Code on the new charge.

3*rd*.—That the Circular Order above referred to directs that the Judge shall not exercise the power of remanding a prisoner before the Magistrate with a view to a fresh commitment being made except upon the "plainest and strongest grounds." That such grounds did not exist in the present case is shown by the Judge having disapproved of the Futwa for your Petitioner's conviction based upon the very evidence upon which he directed the fresh commitment.

4*th*.—That no proper proceedings were taken to procure your Petitioner's commitment upon the new charge. That when the Sessions Judge thought it expedient that your Petitioner should be committed on a new charge, he ought to have sent your Petitioner before the Magistrate that the charge might be preferred against your Petitioner, and your Petitioner examined thereon and confronted with the prosecutor and witnesses while giving their testimony on oath in support of that charge with opportunity to your Petitioner to cross-examine them and producing evidence to rebut the charge.

5*th*.—That your Petitioner was never in fact committed or held to bail to take his trial on the said third count, and that the Sessions Judge was, therefore, without jurisdiction to try him upon that count. That the mere addition of a count to a Calendar made in the absence of either prosecutor or person charged, and under the simple initials of the Committing Magistrate, wants all the essentials of a valid commitment and sets at nought all the decent formalities of criminal procedure.

6*th*.—That supposing your Petitioner to have been legally brought to trial on the said third count, your Petitioner was entitled to be acquitted thereon when the case was first referred to the Nizamut Adawlut, your Petitioner having pleaded to that count, and the Futwa of the Law Officer having been taken thereon, which Futwa was in the nature of a verdict, but was not supported by any evidence. That the order of the Nizamut Adwalut of the 9th July 1861, which the Judges who passed it admitted to be without precedent, was in consequence illegal and improper, and that your Petitioner ought not to have been put a second time on his trial for the same offence.

7*th*.—That supposing the order of the 9th of July to have been legal, your Petitioner, when brought to trial on the said third count in December last, was entitled to claim, and did duly and legally claim exemption from trial under the provisions of the Mahomedan Criminal Code. That the opinion of the Nizamut Adawlut, expressed in the letter of their Register of the 24th of October 1861, to the address of the Sessions Judge, that it was then too late for your Petitioner to make such claim, was erroneous, inasmuch as that Court, by remitting the Record for the purpose of having evidence taken on the third count, virtually held that all that had been done on the trial of the said count after your Petitioner had pleaded thereto had been null and void, and therefore your Petitioner, when brought to trial on that count in December last, was in the contemplation of the law in the same position as if he had only that moment pleaded "Not Guilty." That your Petitioner was debarred the opportunity of making such claim on the occasion of the former trial by the error of the Sessions Judge in continuing the trial upon the first two

counts. That the Nizamut Adawlut has erroneously held that your Petitioner waived his right to claim exemption from trial on the third count under the provisions of the Mahomedan Criminal Code by going into a defence on the said third count before the Mahomedan Law Officer on the occasion of the first trial. Your Petitioner was obliged on that occasion to go into his defence on the first two counts, and did so, filing a written defence. There is not a word in that defence which is not applicable to the first two counts, nor is any mention made of the third count in that defence. Your Petitioner was never in fact put to any defence on the third count, as no evidence had been given in support of that count, and your Petitioner denies that on that occasion he went into any defence on the third count beyond simply pleading "Not Guilty" thereto. Even, however, had your Petitioner done so, he submits that the trial on the third count, after the record had been remitted to the Sessions Court, was to all intents and purposes a new trial, and that your Petitioner, when so brought to trial, was entitled to all the rights conferred by the Legislature on Hindoos of claiming exemption from trial under a foreign Code.

8*th*.—That the instructions of the Nizamut Adawlut, precluding the Additional Sessions Judge beforehand from the exercise of his power and duty to decide upon your Petitioner's claim to exemption when the same should be made, were illegally and improperly given, and that the order of the Sessions Judge rejecting the prayer of your Petitioner's Petition of the 11th of December last as being contrary to the express instructions of the Nizamut Adwalut conveyed by the letter of their Register on the 24th of the preceding October was illegal and improper.

9*th*.—That the said Moulvee Fyezoollah had vacated the appointment of Mahomedan Law Officer at Hooghly before your Petitioner was brought to trial on the 11th December 1861, and was never duly reappointed as Law Officer to conduct your Petitioner's trial.

10*th*.—That the said Moulvee Fyezoollah never accepted the office or responsibility of Law Officer on the occasion of your Petitioner's trial in December last.

11*th*.—That the said Moulvee Fyezoollah was not competent to exercise the functions of Law Officer on the occasion of your Petitioner's trial in December last, as he had not taken the oath of Office as prescribed by the Regulations.

12*th*.—That the Futwa given by the said Moulvee Fyezoollah in December last, was invalid and void inasmuch as it was not given by him in capacity of Law Officer presiding on the occasion of your Petitioner's trial, nor in capacity of Law Officer at all, but as "former Law Officer of the Civil Court of Zillah Hooghly."

13*th*.—That the Futwa given by the said Moulvee Fyezoollah in December last, was informal and void, not being under seal as required by the Regulations.

14*th*.—That the evidence upon which your Petitioner has been convicted is wholly untrustworthy, and the case attempted to be made against your Petitioner the most improbable that can well be imagined, in support of which remarks your Petitioner craves attention to a few of the more prominent features of the case :—

1*st*.—The real prosecutors in this case are your Petitioner's own brother Rajkissen Mookerjee and Hurryhur Mookerjee. The Judges of the Nizamut Adawlut, in their remarks made on the occasion of their convicting your Petitioner, say "that the brother and nephew of the prisoner are deeply mixed up in the prosecution, and that between those persons and the prisoner a deadly feud exists cannot admit of doubt." Documents have been filed in the case which show that the present is only one of a series of charges which your Petitioner's said brother and nephew have, during the last three years, preferred against your Petitioner in the Criminal Courts, imputing to your Petitioner forgery, dacoity, attempt at murder, and other atrocious crimes, all which charges have until the present failed in effect.

2*nd*.—The nominal prosecutor, a servant of the above hostile relatives, acknowledged, while under cross-examination, that Rajkissen Mookerjee had supplied funds for the purposes of the prosecution to the extent of between 36,000 and 40,000 Rupees. It is notorious that he has expended more than a lac of Rupees to procure the conviction of your Petitioner.

3*rd*.—The only witnesses brought to prove the alleged forgery are servants of Rajkissen and Hurryhur, ryots of the poorest class, and a father and five sons of the name of Dhur. The Judges of the Nizamut Adawlut have found as a fact that these Dhurs have, since the prosecution was set on foot, received very valuable pecuniary considerations from Hurryhur Mookerjee. The Judges view this as "a transaction intended to bind the Dhurs to his, Hurryhur Mookerjee's, interest," but refuse to consider it in any worse light than as intended to prevent the Dhur's yielding to possible and probable solicitations on the other side.

4*th*.—The Counsel for the prosecution have described your Petitioner as "a man of great talent;" yet they ascribe to your Petitioner the following conduct, *viz*., that having ascertained that the Dhurs had granted a lease or izarah to the prosecutor, your Petitioner deliberately caused to be forged a lease of the same date from the same persons of the same property to a dependent of your Petitioner, reserving on the forged lease a less rent than that reserved in the genuine lease, forcing two unwilling ryots under the intimidation of threats to attest the forged lease, your Petitioner appearing personally in the transaction, and putting the names of two other ryots on the forged instrument without any previous communication with them, one of them being a person with whom your Petitioner had never even spoken, and registering the deed so attested without ascertaining that the ryots whose names had been used would give evidence in support of the deed.

5*th*.—The Counsel for the prosecution have described your Petitioner as "a man of great wealth and landed property," and the Judges have recognised as correct the mention made by your Petitioner's Counsel of the intelligence and degree of European civilisation which characterise his client, and which have led him to perform duties to his countrymen and to endeavour to diffuse amongst them that intelligence and civilisation by founding libraries, dispensaries, schools and municipal institutions, and in fact has led him to put himself at the head of the public spirit of his countrymen. Yet the crime of which your Petitioner is supposed to have been guilty is pro-

curing the forgery of a ten years' lease yielding at the outside, according to evidence for the prosecution, a profit of 100 Rupees or £10 sterling a year.

6th.—No proof was attempted to be given of your Petitioner having ever endeavoured to obtain the above lease by fair means, although there is no reason to suppose that the Dhurs would have refused to grant it if asked, they having already leased two-thirds of the same property to your Petitioner at the same rate of rent.

7th.—The Judges of the Nizamut Adawlut acknowledge that there has been a failure of proof of any motive inducing your Petitioner to commit the crime imputed to him, but they supply the want of such proof by a conjecture that "an imperious and self-willed disposition impatient of because not accustomed to successful opposition has, from the desire which that disposition generates of possessing what is not its own, given rise to the act for which the prisoner is now on his trial."

8th.—The only direct evidence connecting your Petitioner with the instrument alleged to be forged was that of four ryots, two of whom deposed that without being previously sounded they were taken at once into Petitioner's presence and there intimidated into attesting the forgery; the other two that their names were put to the forged deed and the deed so attested taken to be registered before they were even spoken to about the transaction. Not one of these witnesses broke silence until thirteen days after the alleged forgery. Three of them then filed Petitions before the Magistrates as to the alleged use made of them, asserting as their reason for so doing an attempted duress on the part of your Petitioner to force them to give evidence in his favor, which allegation of duress they afterwards acknowledged to have been false, and all four of these witnesses were kept in terror of prosecution for several months before they were made witnesses for the prosecution, and this, although the prosecutor was well aware that three of them had filed the above-mentioned Petitions. The Judge who heard the evidence of these witnesses considered the story told by them too improbable for belief, and even the Judges of the Nizamut Adwalut, while acting on their evidence, have discredited so much of it as ascribes the fact of their attestation to intimidation.

9th.—The Counsel for the prosecution opened a case against your Petitioner very much stronger than any which it was attempted to establish by evidence. The written address for the prosecution, containing the following passage "Joykissen has avowed to others the ownership of the Pottah (the alleged "forged lease) representing it as having been taken for himself, nay he "has even gone the length of exercising acts of ownership under it, "applying to the ryots for payment of their rents, receiving payment "from them, and taking Kubooleuts (or letters of attornment) from them "on the same footing of his title as ezaradar under the Pottah." Not a tittle of evidence was given at the trial to establish these alleged declarations or acts of ownership, nor had they ever been alluded to before the Magistrate.

10th.—The Pottah or Lease, with procuring the forgery of which your Petitioner has been charged, bears date the 18th of Assar 1267, corresponding with

Saturday the 30th of June 1860, and was duly registered on Monday the 2nd of July A. D. 1860. The Pottah or Lease of the same property upon which the prosecutor relied, and which also bears date the 18th day of Assar 1267, was not registered until Wednesday the 4th day of July 1860, and the suggestion submitted by your Petitioner in his defence for the consideration of the Court was that probably the execution of the last-mentioned Pottah had been procured at the instigation of your Petitioner's hostile relatives at some time between the 2nd and 4th of July, the same being antedated, and inducement held out to the Dhurs to execute the same being the increased rent reserved on the Pottah granted to the prosecutor, and perhaps the promise of the other pecuniary advantages which the Judges have found that the Dhurs subsequently received from your Petitioner's hostile nephew. It was stated on the part of the prosecution that one Sibnath Roy, who is described by the Judges of the Nizamut Adawlut as "the Dhurs' vakeel and patron," took a most active part in the negotiation for and the preparation of the Pottah on which the prosecutor relied. Sibnath Roy is a man of some position and a vakeel practising in the very Court before which your Petitioner was tried. His evidence, if it would have borne out the above statement, would have been all-important for the prosecution, yet he was not called as a witness for the prosecution, neither was the vendor of the stamped paper on which the prosecutor's Pottah was engrossed, although the purchase of that paper at a distance of more than twenty miles from the place where the Pottah was executed, and on a date which could not be ascertained from the witnesses for the prosecution, was made the subject of much remark by your Petitioner's Counsel.

Verified copies of the following documents, which set forth the various proceedings referred to in this Petition, are annexed (that is to say)—

Decision of J. P. Grant, Esq., Joint Magistrate of Hooghly, dated 9th November 1860.

Order of C. T. Buckland, Esq., Sessions Judge of Hooghly, dated 21st January 1861.

Calendar of Prisoners committed 23rd February 1861, by the Joint Magistrate of Zillah Hooghly, tried before the Additional Sessions Judge of Hooghly 30th March 1861.

Letter of J. E. S. Lillie, Esq., Additional Sessions Judge of Hooghly, to the Register of Sudder Nizamut Adwalut, Calcutta, dated 6th May 1861.

Order of the Nizamut of 9th July 1861, on the reference by the Sessions Judge of the case against Joykissen Mookerjee.

Resolution of the Presidency Court of Nizamut Adawlut, Calcutta, dated 27th September 1861.

Letter of J. E. S. Lillie, Esq., Additional Sessions Judge of Hooghly, to the Register of Nizamut Adwalut, Calcutta, dated 30th September 1861.

Letter of the said J. E. S. Lillie, Esq., Additional Sessions Judge of Hooghly, to the Register of Nizamut Adwalut, Calcutta, dated 8th October 1861.

Petition of Joykissen Mookerjee to the Sudder Nizamut Adawlut to review Order of 9th July 1861.

Letter from Lord H. Ulick Brown, Register of the Nizamut Adawlut, to the Secretary to the Government of Bengal, dated 1st October 1861.

Letter from the Officiating Under-Secretary to the Government of Bengal, to Moulvee Fyezoollah, Deputy Magistrate, Jessore, late Law Officer of Hooghly, dated 7th October 1861.

Remarks of the Sudder Nizamut Adawlut on the Petition to review Order of 9th July 1861, dated 9th November 1861.

Petition of Joykissen Mookerjee to Additional Sessions Judge of Hooghly, dated 11th December 1861, with Order of Sessions Judge endorsed of same date.

Petition of Joykissen Mookerjee to Sudder Nizamut Adawlut, Calcutta, that it might be open to Sessions Judge to try by Jury, with copy.

Petition to Sessions Judge of 13th November 1861, annexed.

Remarks of Sudder Nizamut Adawlut, Calcutta, on the trial of Joykissen Mookerjee, dated 16th December 1861.

Futwa of the Moulvee.

Decision of the Sessions Judge, dated 23rd December 1861.

Petition of Joykissen Mookerjee to Sessions Judge of Hooghly, dated 3rd January 1862, and Order of Sessions Judge thereon, dated 4th January 1862.

Remarks of Sudder Nizamut Adawlut, Calcutta, on the trial of Joykissen Mookerjee, dated 31st March 1862.

Petition of Joykissen Mookerjee to the Sudder Nizamut Adawlut, dated 31st March 1862, with Order, dated 3rd April 1862, annexed.

Your Petitioner, therefore, most humbly prays that your Majesty in Council will be pleased to order that your Petitioner shall have special leave to appeal from the said Orders, and from the said conviction and judgment and sentence of the Sudder Nizamut Adawlut, and the said Sudder Nizamut Adawlut may be ordered to transmit forthwith the transcript of the proceedings and evidence upon which your Petitioner has been tried and convicted to the Privy Council Office, and that your Majesty will be pleased to direct that, until the hearing of the Appeal herein prayed for, your Petitioner may be admitted to bail, or until such other time as to your Majesty may seem fit, or that your Majesty may be graciously pleased to make such further or other Order as to your Majesty in Council may appear just and proper.

And your Petitioner will ever pray, &c.

JOYKISSEN MOOKERJEE.

JUDICIAL COMMITTEE

OF THE

PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL, WEDNESDAY, JULY 16TH 1862.

Present:

THE RIGHT HON'BLE LORD KINGSDOWN.

THE RIGHT HON'BLE T. LUSHINGTON, D. C. L.,

Judge of the Admiralty Court.

THE RIGHT HON'BLE SIR J. T. COLERIDGE.

THE RIGHT HON'BLE SIR L. PEEL.

THE RIGHT HON'BLE SIR J. COLVILE.

In the matter of the Petition of Joy Kissen Mookerjee.

JUDGMENT.

RIGHT HON'BLE T. LUSHINGTON,

THEIR Lordships are of opinion Mr. Forsyth, that it will not be expedient to trouble you upon this question.

This is an application for leave to appeal a decision of a Criminal Court in the East Indies.

It appears from the proceedings in the case that a person of the name of Joykissen Mookerjee has been convicted of a criminal offence, *viz.*, that of having procured the leases of certain property to be forged. The questions for the decision of their Lordships are, or at least they have been argued to be, these,—*first*—It has been contended that there exists on behalf of the crown a prerogative right of appeal even in matters of criminal jurisdiction; and *secondly*—That this is a proper case in which the authority of the Crown should be interposed for the purpose of doing justice.

Now, with reference to the existence of this prerogative of the Crown, their Lordships are desirous that no expression should fall from them which in the slightest degree would throw doubt upon the existence of that prerogative, not only under existing circumstances but in others which might arise with reference to other dominions of the Queen which may have been acquired by conquest, because they do not think it necessary that they should, on the present occasion, enter minutely into the consideration upon which the prerogative of the Crown is founded. They think it will suffice for the purpose of this case to assume that it does exist, and consequently that it is in the power of the Judicial Committee exercising that prerogative right under the Crown so to advise Her Majesty if they should think they ought to allow an Appeal on the present occasion.

With regard to the merits of the case itself, their Lordships certainly are inclined to come to the conclusion that the course of justice has not been very well administered on the present occasion, and supposing it to have been a civil case and not a criminal case, they would have had no hesitation whatever in recommending to Her Majesty to allow an Appeal for the purpose of considering these proceedings and of doing justice to the party complaining.

But this is a criminal case and subject to very different considerations. Admitting therefore two things—admitting the existence of the Prerogative to the Crown, and admitting that this is a case of *primâ facie* and presumptive great grievance—their Lordships have now to determine whether, looking at all the circumstances attending the granting of Appeals in criminal cases, it would be their duty to advise Her Majesty to grant this Appeal or to withhold it.

We must recollect in the first place that by granting an Appeal is meant an examination of the whole of the proceedings which have taken place. It is not simply for the decision of any legal question which might arise; it is for the purpose of examining the whole of the evidence and the whole course of the proceedings upon the trial to enable us to come to a conclusion upon the merits.

Now, it is of no small importance to bear in mind that notwithstanding the numberless instances in which an application of this kind might have been made to the Queen in Council from all the various dominions subject to Her Majesty, from all those parts of her dominions that were acquired by conquest and where Her Majesty had the entire sovereign power of legislating for them, according as she might thing fit, *i. e.*, either by orders in Council or as was determined on a former occasion by virtue of letters from the Secretary of State, it is, I say, to be borne in mind that in no instance whatever of any grievance however great at any time has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case. We can easily call to memory very many instances which have occurred in the Colonies, in which it has been alleged that gross injustice has been done, even lives sacrified where they ought not to have been exposed to any danger, but no such precedent has existed, and we think it is obvious upon the least consideration how it is that no such precedent has existed, and how it is that no such precedent would have been created even if an attempt had been made to call into force the power of the Crown. It may be true that on some occasions it is not very desirable to argue simply from consequences alone; but the consequences of granting an Appeal in cases of this description are so exceedingly strong, they are so entirely destructive of the administration of all criminal jurisprudence, that we cannot for a single moment doubt that they are of the greatest importance in guiding us to form a Judgment.

Now, if we were to advise Her Majesty to grant an Appeal in this case, how would the case stand? It is simply the case of an individual having been convicted of causing documents to be forged. Would not the same right apply to capital cases? What could be done in a capital case? Is there any distinction which can be drawn? If the prerogative of Her Majesty gives this individual the right of appeal, could any Rules or Regulations be imposed whereby that right of appeal could be governed or could be restricted? So you would go through the whole catalogue of cases, and there is no doubt whatever, that, whenever punishment was likely to ensue, there would follow an Appeal to Her Majesty in Council, and consequently not only would the course of justice be maimed, but in very many instances it would be entirely prostrated.

These are the reasons which operate on our minds in rejecting this application, not at all forgetting that injustice may have been done in this individual case and not at all forgetting that the power of the Crown may be invoked in another shape and that that injustice may be remedied. Their Lordships are of opinion that they cannot, under the existing circumstances, advise Her Majesty to exercise this right of appeal, but they doubt not that justice may done, because they would suggest that an application should be made to the constituted authorities, who have the power to afford a remedy though

in a different way. They doubt not that when it is represented to these authorities that this suggestion emanates from the Judicial Committee, they will not be loath to examine into the circumstances of the case, and to do that which justice may require.

We have only one word more to say on the present occasion. Their Lordships do not think it necessary to enter at all into the question which has been discussed at the Bar this morning. It would require a very nice examination of the Statutes and the Criminal Law of India, which could only end in the same way. Whatever might be the result of that examination, we have no hesitation in saying the course we are now about to adopt, would be the same we should then recommend Her Majesty to pursue. We cannot grant this application.

EXTRACT of a Minute by the Lieutenant Governor of Bengal.

I HAVE received and read the Minutes of the Judges of the High Court in the case of Joykissen Mookerjee.

Although I hold that assuming the guilt of the prisoner as found in the Judgment of the Sudder Court, the reasons stated in my former Minute (bearing date the 20th ultimo) required me to remit the remainder of his punishment without waiting any longer for the advice of the Judges of the High Court, I am by no means satisfied either that any reasonable doubt has been cast on the real guilt of the prisoner, or that he was materially prejudiced in his defence by the irregularities of procedure to which the Judicial Committee of the Privy Council have alluded.

It is not for me to enter into the controversy that has arisen as to the misformality of the trial on the value of the legal evidence recorded against the prisoner. I take the Judgment of the Sudder Court as a valid and a final Judgment, and I agree with those of the Judges of the High Court who do not advise that the prisoner should be pardoned, so far as to think that substantially he has had a fair trial, and that he is morally guilty of the crime of which he has been convicted. The reasons which led me to remit the remaining portion of the sentence are not affected by any thing contained in these Minutes but the Minutes, satisfy me on the whole that the prisoner ought not to be pardoned.

I have therefore no further orders to give in respect to Joykissen Mookerjee, who has already been released from Jail.

MINUTES of the Hon'ble the Chief Justice and the Judges of the High Court in the case of Joykissen Mookerjee.

THE Officiating Secretary to the Government of Bengal has addressed a letter to the Registrar of the High Court, dated the 6th instant, (received on the 8th), transmitting by order of his Honor the Lieutenant-Governor, for the consideration of the Judges of the High Court, a communication from the Government of India with reference to a Judgment of the Judicial Committee of the Privy Council in the case of Joykissen Mookerjee. The prisoner was sentenced to five years' imprisonment on a charge of causing the forgery of a Pottah. The principal papers enclosed are,—the Petition of Appeal of Joykissen Mookerjee, the Judgment of the Lords of the Judicial Committee thereon, a Letter from the Registrar of the Privy Council, a Despatch from the Secretary of State for India, two Letters from Mr. Newmarch, one of the prisoner's Counsel, and Statement drawn up by Messrs. Bovill and Hannen who acted as Counsels for the Petitioner before the Judicial Committee.

His Honor the Lieutenant-Governor requests that the Judges of the High Court will favor him with such remarks as they or any of them may desire to make, and also to furnish him with their opinion as to whether, with reference to all the circumstances of the case, and especially to the Judgment of the Judicial Committee and the opinion of the Lord President of the Council as conveyed in the Registrar's letter, there is ground for pardoning the prisoner, or for remitting the remainder of his punishment. It is not my desire to offer any remarks; but as the opinion of the Judges is requested, I have no hesitation in expressing my opinion and the reasons upon which it is founded.

I think it will be more convenient in the first place to consider the second ground to which reference is made by his Honor the Lieutenant-Governor, *viz.*, the Judgment of the Judicial Committee. The Lords of the Judicial Committee remarks that "by "granting an Appeal is meant an examination of the whole of the proceedings which have "taken place. It is not (they observe) simply for the investigation of any legal question "that might arise; it is for the purpose of examining the whole of the evidence and the "whole course of the proceedings upon the trial to enable us to come to a conclusion upon "the merits."

The Appeal was rejected, and the Lords of the Judicial Com mittee did not investigate the case so as to enable them to declare that the Sudder Court was wrong in point of law, or that they were wrong in point of fact, in holding that the prisoner was guilty.

They express no opinion upon either of these points; they merely declare that they are not forgetful that injustice "may have been done" (but not that it has been done) "in this individual case." They do not say that after an investigation of the evidence, they believe the prisoner to be innocent, or even that they entertain doubts as to his guilt. They do not say that in their Judgment he was prejudiced in his defence by the irregularities of procedure. They do not even recommend a pardon, but merely suggest that an application be made to the constituted authorities, and state that they doubt not that when it is represented to those authorities that the suggestion *emanates* from the Judicial Committee, they will not be loath "*to examine into the circumstances of the case* "*and to do that which justice may require.*"

I am therefore of opinion that the Judgment of the Judicial Committee is not of itself sufficient to justify a pardon. It appears to me to amount merely to a recommendation to the authorities to examine into the circumstances of the case based upon the ground that "their Lordships were inclined to come to the conclusion" that justice had not been very well administered.

As to the second ground, *viz.*, the opinion of the Lord President of the Council.

The Lord President of the Council has expressed no opinion on the case, but has merely called the attention of the Secretary of State for India in Council to that portion of the Judgment to which I have already referred. The Right Hon'ble the Secretary of State for India has, in my humble opinion, put the case upon its proper grounds. He says in paragragh 2 of his despatch to the Governor General of India in Council: "You "will consider, on receiving this expression of the sentiments of their Lordships whether "this is not a proper case for the exercise of the powers vested in you under Act XVIII. "of 1855, if you shall be of opinion either that doubt has been cast on the real guilt of "the prisoner, or that the prisoner was prejudiced in his defence by the irregularities of "procedure to which their Lordships' intimation is directed."

I entertain the highest deference and respect for the opinion of each Member of the Judicial Committee who sat in this case. Had they expressed any opinion upon the law or the facts, I should have felt myself bound by it. But I do not consider that they intended to express any decisive opinion upon the case, and I therefore come to the consideration of the circumstances with a mind unbiassed by the Judgment of the Judicial Committee. I have read the Petition of the prisoner and the Judgment of the Sudder Court very carefully, and I see no reason to think that that Court came to an erroneous conclusion as to the guilt of the prisoner. As the Judicial Committee do not appear to have examined the evidence, and have not expressed any doubt as to the guilt of the prisoner, I have not thought it necessary to read through the evidence, which is in the native language; I could not do so without having a translation made, and that would cause considerable delay. The reasons which operated upon the minds of the Judicial Committee against admitting the Appeal appear to me to apply with equal or even stronger force against a fresh examination of the evidence by the Judges of the High Court after a decision has been passed upon it by the highest competent Court in this country composed of Judges of equal degree and as well qualified as themselves.

If reasons of public policy, and especially those pointed out in paragraph 8 of the Judgment of the Judicial Committee, were opposed to a review of the decision of the Sudder Court by the Judicial Committee of the Privy Council, they must equally be opposed to a review of it by the Judges of the High Court in the absence of any expression of doubt as to the guilt of the prisoner. No doubt has been intimated as to the correctness of the decision of the Sudder Court upon the facts; and there can be no more reason for the other Judges examining the evidence in this case than there is in any other. The two learned Counsels, Messrs. Bovill and Hannen, who appeared for the prisoner before the Judicial Committee, have, in the paper addressed to the Secretary of State, expressed their opinion on the case. That opinion, according to the letter of Mr. Newmarch to the Secretary of State, dated the 30th of July 1862, was arrived at after a full perusal of all the papers connected with the case. Yet it is to be remarked that the opinion is confined to the legal points, and the learned Counsels carefully abstain from expressing any opinion upon the merits of the case, or as to the opinion which they formed with reference to the guilt or innocence of the prisoner. They preferred to rest upon the opinion of the Judge who tried the case, an opinion which, it must be observed, was at variance with that of the Law Officer, and with the opinion of the two Sudder Judges who ultimately heard and determined the case.

Mr. Newmarch, in his letter to the Secretary of State of the 28th July last, says,— "Having acted as Counsel for the Petitioners throughout the proceedings in the Indian "Courts, I have formed a very strong opinion, in which my senior, Mr. Peterson, con- "curred that my client was fully entitled to an acquittal upon the merits." And in another part of the same letter he says,—"As respects the general evidence in the case

"not as directly affecting Joykissen Mookerjee, both Mr. Peterson and I were strongly "of opinion that the lease alleged to be a forgery was a genuine instrument."

This latter opinion is at variance with that both of the Judge who tried the case and of the Law Officer, as well as with that of the Sudder Court; for Petumber Bose was convicted of the forgery and of the uttering by the unanimous finding of the Judge and the Law Officer, and, upon appeal to the Sudder Court, was sentenced to be imprisoned with labor and irons for five years for uttering a forged document. If the lease was a genuine document and not a forgery, Petumber Bose has been wrongfully convicted, and ought to be pardoned. Though he had not the same means, as Joykissen Mookerjee, of carrying the case to England, he is as fully entitled to the benefit of the opinion of Mr. Newmarch and Mr. Peterson as Joykisson Mookerjee.

I proceed now to examine the technical points or the irregularities in the procedure.

These are what, I presume, are alluded to by the Judicial Committee when they say that they are inclined to come to the conclusion that justice has not been very well administered.

The case is shortly this—

Joykissen Mookerjee and Petumber Bose were committed for trial on a charge, *first*,—of forging a Pottah; *secondly*,—of knowingly uttering it. The trial commenced on the 30th March 1861, before Mr. Lillie, Additional Sessions Judge of Hooghly, and Moulvie Fyezoollah, then the Mahomedan Law Officer of the Sessions Court of Hooghly.

The prisoner did not at that time avail himself of the privilege conferred by Regulation VI. of 1832, and claim to be exempted from trial under the provisions of the Mahomedan Criminal Code, possibly thinking at that time that he would have a better chance of acquittal under that form of trial than he would have if, tried in one of the modes referred to in Section IV. of that Regulation, in which the decision would be vested exclusively in the Judge. Be this as it may, the exemption was not claimed at that time, the trial proceeded, and the witnesses for the prosecution were examined. At the close of the prosecutor's evidence the Counsel for the prosecution applied to the Judge to add a count charging Joykissen Mookerjee, with having caused or procured the forgery of the Pottah. This probably was not actually necessary; for a man who causes a thing to be done, except in the case of felony, which this was not (being in the Mofussil) may generally be charged with doing it, the maxim of law being *Qui facit per alium facit per se*. But the precaution was probably adopted as persons convicted of causing or procuring a forgery are, by Regulation II. of 1807, Section III., expressly declared to be subject to the same punishment as those who commit forgery. The Calendar was therefore sent by the Judge to the Magistrate with an order to add the count and to re-commit the prisoner for trial upon such additional charge. The Magistrate amended the charge by adding the count and returned it to the Court of the Sessions Judge. It is stated in the Petition, paragraph 8, that the prisoner was never taken before the Magistrate on the additional charge, and that neither the prosecutor nor any of his witnesses attended before the Magistrate to prefer the charge; that the prisoner was not examined before the Magistrate on the charge nor called upon to answer the same, nor was any opportunity given to him for producing evidence before the Magistrate to rebut the charge. In short, it is stated that Joykissen Mookerjee with his Counsel, and the prosecutor with his Counsel, remained in the Court of the Sessions Judge. The prisoner and his Counsel do not appear to have made any application at the time to the Judge upon the subject, or to have requested that the prisoner might be taken before the Magistrate. The matter appears to have been treated rather

as a matter of form (as it really was) than of substance. After the Calendar had been returned with the additional charge, the prisoner was called upon to plead and pleaded "not guilty" to all the counts. After the prisoner had pleaded, no witness was examined for the prosecution, but the prisoner and Petumber Bose proceeded to examine their witnesses upon all the charges to which they had pleaded, and a written defence was put in by the prisoner.

The Mahomedan Law Officer delivered his Futwah that the prisoner was not guilty on the first and second counts, but guilty on the third or additional count. The Judge disapproved of the finding against the prisoner on the third count, and proceeded to complete the trial, and transmitted it to the Sudder Court.

It should be remarked that the prisoner made no objection at the time to the case being sent back to the Magistrate, nor did he or his Counsel, upon the return of the record, object to his being tried by the Judge and the Law Officer, or require the witnesses to be examined *de novo*.

Whether the objections did not occur to him or to the learned Counsel by whom he was assisted at the trial, or whether he reserved the objections for the purpose of upsetting the trial, if he should be convicted, does not clearly appear; but it can scarcely be supposed that he would not have made the objections at the trial if either he or his learned Counsel had considered that he was likely to be prejudiced in his defence by the irregularities. But as soon as the case came before the Sudder Court, the prisoner's Counsel objected that the Judge was wrong in sending the Calendar back to the Magistrate with orders to add another charge, and proceeding to try the said charge upon the same record with those originally preferred; and contended that as the trial had been held and completed on the additional charge without any evidence being given upon it for the prosecution, the prisoner was entitled to be acquitted.

Paragraph 12 of Petition.

The Sudder Court, on the 9th of July 1861, ordered that the case should be remitted to the Sessions Judge with directions to re-take the evidence of the witnesses as to the third count, in a proper legal form, and having conducted the whole trial on that count with the assistance of the Law Officer who sat with him, if he were still there, and if not, with his successor, to pass on the prisoner whatever sentence might eventually seem just and proper.

Paragraph 12

The objection that the witnesses were not re-examined on the third charge after the amendment was really a mere technical one; the prisoner and his Counsel were present during their examination; the witnesses had been cross-examined, and if there had been any substantial ground for having them examined *de novo*, the prisoner or his Counsel would have applied for it before they entered upon his defence or called his witnesses. If he had objected at the time, the Sessions Judge would, doubtless, have had them re-called and examined.

The course taken was no more than that which is ordinarily pursued when an indictment is amended in England, under the 14th and 15th Victoria Chapter 100, on the ground of variance. In fact it was merely on account of a matter of form that the case was sent back to the Magistrate at all.

On the 11th of December 1861, the Judge, under the order of the Sudder Court, proceeded to take the evidence of the witnesses in the presence of the Mahomedan Law Officer; and the latter Officer found, as before, that the prisoner was guilty on the charge of causing the Pottah to be forged. The Additional Judge being of opinion that he was not guilty, the case was again transmitted to the Sudder Court.

The mode in which the evidence was re-taken by consent of the prisoner and his Counsel on the latter occasion, by reading the depositions instead of examining the witnesses *de novo*, shows that the prisoner had not been prejudiced by the fact of the witnesses not having been re-examined on the first trial after the additional charge had been added. But the prisoner had gained his object. Having found that upon the first trial the opinion of the Law Officer upon the evidence was against him, and that of the Judge was in his favor, as soon as the case came on for taking the evidence *de novo*, he claimed for the first time to be exempted from trial under the Mahomedan Criminal Code, and that the trial might be proceeded with in one of the modes referred to in Section IV. Regulation VI. of 1832. The claim was overruled under the orders of the Sudder Court, and the trial proceeded.

This is the great objection upon which Messrs. Bovill and Hannen rely. They say that if the prisoner had been tried without the Law Officer, the Judge would have acquitted him. They assume that the Judge must have come to the same conclusion with the aid of a Jury or Assessors as he did without.

This objection and the others which were made were all overruled by the Sudder Court on the last hearing. They held that the prisoner was too late to claim the exemption at that time. In fact, the order of the 9th of July 1861, by which the case was remanded to the Sessions Judge to retake the evidence, was distinct upon the subject.

That order was, in my opinion, a legal one; and I entertain no doubt whatever that the learned Judges of the Sudder Court were right in overruling the objection, and that in point of Law the prisoner was too late to claim to be tried without the assistance of the Law Officer, after he had submitted to that form of trial in the first instance without objection, and had thereby found out what was the opinion of the Law Officer upon the evidence.

I am of opinion that the second trial was properly held before the Judge and the Law Officer, notwithstanding the claim to exemption then made by the prisoner.

The Sudder Court, the highest Criminal Court in this country, have so decided after argument; the Judicial Committee have not expressed an opinion to the effect that that decision was erroneous.

Even if the second trial had been quashed by the Judicial Committee, the prisoner would not have been entitled to an acquittal, but merely to a trial *de novo* upon the ground that the second trial was *coram non judice*.

I concur with the Sudder Court in thinking that the objection with regard to the Law Officer's not having been re-appointed and re-sworn was untenable. If the Law Officer had actually resigned his appointment, as stated in the Petition, I think the direction of the Bengal Government contained in the letter of the 7th of October 1861, paragraph 21 of the Petition, was substantially a re-appointment.

Numerous other objections were made, such as that the prosecutor had not been bound over to prosecute over the third charge, and that the prisoner had not been committed or held to bail to take the trial thereon, and that the Futwa was not under seal. It is unnecessary for me to enter into any minute consideration of them all; but I may state shortly that they appear to me to be mere technical objections not affecting the merits, and they seem to be so treated even in the Petition.

See paragraph 19.

Further more, they were all overruled by the Sudder Court. In cases of this nature I would rather act upon the Judgment of the Court than upon certificates or opinions of prisoner's Counsels.

I have consulted the two learned Judges by whom the prisoner was convicted. They have not the slightest doubt as to his guilt; and I see no reason whatever to think that they came to an erroneous conclusion upon the facts.

The prisoner had a fair trial, he was assisted by Counsel of learning and ability; the witnesses for the prosecution were examined in his presence, and were twice cross-examined on his behalf; his own witnesses were examined; and his defence was heard. Every technical objection which ingenuity could suggest appears to have been taken and argued on his behalf before the Sudder Court. Those objections have all been overruled by the Court after careful consideration and in an elaborate Judgment. That Judgment has not been impeached by any competent tribunal, and I believe it to be correct in point of law. In my opinion the second trial before the Judge and Mahomedan Law Officer was a legal one, and the prisoner was legally convicted by the Sudder Court.

I do not believe that he was in any way prejudiced in his defence or otherwise by the alleged irregularities in the Court below. The Privy Council have not intimated that in their opinion the prisoner is innocent, or that the second trial before the Mohamedan Law Officer was illegal.

When men who are guilty escape in consequence of technicalities, the administration of justice is brought into disrepute; but in this case the law prevailed over the technicalities.

The offence of causing forgery, of which the prisoner was convicted, is very prevalent in this country, and every endeavor is being made to put it down by the strong arm of the law. It would, in my opinion, be very injurious to the administration of justice to pardon the prisoner in this case. It would hold out a premium to prisoners and their Counsel to allow technical irregularities to pass without objection, or even with tacit consent, in order that when it is too late to rectify them, they may be used for the purpose of frustrating the ends of justice, and of procuring an acquittal or pardon in the event of a conviction upon the evidence. Finally, and worst of all, it would lead to the impression that there is one law for the rich, and another for the poor, I know that I am under a grave responsibility in standing between the prisoner and the exercise of the prerogative of mercy; but I cannot recommend the Lieutenant-Governor to pardon the prisoner, or to remit any part of the sentence.

(Signed) B. PEACOCK.

The 22nd November 1862.

I HAVE carefully considered the proceedings in this case, for I feel satisfied notwithstanding the vagueness of the language used by the Judicial Committee in their Judgment, that they never would have made the recommendation in it, unless they were satisfied that the prisoner had many serious objections to urge against the proceedings of the Courts below.

I am not satisfied that the Appellate Court had the power to remit the case for trial on the third count; I can find no law authorizing the adoption of that course, and it seems wrong on principle. The Nizamut Adawlut, by its order of the 9th of July 1861, admit that they could find no precedent for it, and that Court does not cite any Regulation or Act authorizing such a course. The Acts XXXI. of 1841 and XIX. of 1848, do not confer such power, and I can find no other Act applicable to the subject. I am unwilling to infer any thing in a criminal case, and I certainly should not infer that the Nizamut Adawlut had a power to remit for new trial because they had a power

to revise. To infer that would be to infer that the Legislative intended to violate a principle of Criminal Law, that a man should not twice be put in peril in respect of the same charge, a principle never departed from except in minor cases, and then only at the prisoner's own request, or when the prisoner has by his own fraud, such as by collusion with the jury, obtained a verdict.

In this case the prisoner had pleaded to the third count in the Court of first instance, and although the trial was not properly conducted, he was in fact tried on that charge and received the Judgment of the Court upon it, the Futwa of the Law Officer finding the prisoner guilty, and the Judge acquitting him on that count. The case was then referred to the Nizamut Adawlut, and I think, as there was no evidence adduced in the Court below to convict the prisoner of the offence charged in the third count, the Nizamut Adawlut should have revised the proceedings by over-ruling the Futwa of the Law Officer, and acquitting the prisoner. The Nizamut was, no doubt, actuated by a desire to see justice done, and the prisoner properly tried upon that count; but I do not see under what power they acted and placed a person who was clearly entitled to an acquittal on the record as it stood a second time in peril in respect of the same charge. Nothing but the production of an express enactment authorising it would satisfy me that the Nizamut Adawdut was right in adopting such a course.

The question raised in the Petition to the Privy Council (paragraph 28 and 29,) and in the appeal to the Sudder, whether the Moulvie Fyezoollah was re-appointed as Law Officer of the Hooghly Court, appears to me very important. It appears from the letter of the 7th October 1861, addressed to the Moulvie by the Secretary to Government, that the Government considered the Moulvie was at that time Deputy Magistrate of Jessore, and only "late Law Officer of Hooghly." The letter itself contains no re-appointment of the Moulvie as such Law Officer, but merely directs him "to proceed to Hooghly by *ddk* at the Government expense for the purpose of sitting with Mr. Lillie, Additional Sessions Judge of that District, at the re-trial &c." Now, it may be that the Government intended to re-appoint the Law Officer, but the question is not what they intended, but what they did. The address to the Moulvie shows that he was then Deputy Magistrate of Jessore, and that he had then ceased to be Law Officer of Hooghly. The words used in the letter do not convey the meaning that the Moulvie was thereby re-appointed Law Officer, and the reference to him as late Law Officer in the address would hardly have been used if the letter was in fact intended as a re-appointment. It seems also clear that the Moulvie himself did not consider himself re-appointed as Law Officer, for he did not again take the oath of office, and signed his Futwa of the 23rd of December 1861, as "former Mahomedan Law Officer of the Civil Court of Zillah Hooghly.

If I could arrive at the conclusion that there was any re-appointment of the Moulvie as Law Officer of Hooghly, however informal that appointment might be, then I should have no difficulty in saying that the Moulvie was Law Officer, *de facto*, and that as such his Futwa must be upheld, see Milward *versus* Thatcher, 2 Term Repts., Buller J. P. 87. But in the absence of any re-appointment to the Office, I do not think the Moulvie was even a Law Officer *de facto*. If the Moulvie had been in fact re-appointed, however irregularly, I should also have thought, that his acts might be supported, although he had not taken the oath (one Kyd. on Corptns. 431,) and if it could be shewn that the Judicial system of this country enabled the Government to appoint persons to try certain cases without appointing them to the office of Law Officer of the Court in which those cases are heard, I should then, of course, see no impropriety in the Moulvies sitting with the Judge at the trial of this case; but no such practice has been suggested as existing, and it is a notorious fact that all Judicial Officers are appointed to their respective offices before they enter on the duties thereof.

I am of opinion the Moulvie was never re-appointed Law Officer of Hooghly, and that this is not a technical objection. If it be sound, as I deem it to be, then the Court before which the prisoner was tried was improperly constituted, and there was a mis-trial. If it had not been for the Futwa of the Moulvie, which, I am of opinion, he had no right to deliver, the prisoner might have been acquitted, and there might have been no reference to the Sudder Court, by which he was convicted.

There are other objections of considerable magnitude which are said to be waived by the fact that neither the prisoner nor his Counsel objected to the course taken by the Court below. I am not aware how far it is intended to carry the doctrine of waiver in criminal cases in this country. It must, I should think, be confined within very narrow limits, or the powers of revision vested in the Appellate Court, would be greatly restricted, inasmuch as Natives defending themselves, never take objection to procedure at their trial, and if the doctrine of waiver is not to affect undefended prisoners, on what principle of law can it be applied to those who are defended by Counsel? I must say I doubt, and view with some jealousy, any doctrine of waiver as applied to Criminal cases in this country.

This opinion is expressed with diffidence, inasmuch as it treats of a law of procedure of which I had no judicial cognizance, and inasmuch as it is opposed to the opinions of others for whose judgment I entertain the greatest respect. But as the question affects the liberty of the subject, I have not felt at liberty to defer to authority, or do otherwise than carefully consider the questions for myself, and state fully the opinion I have arrived at.

(Signed) C. R. M. JACKSON.

The 15th December, 1862.

I concur entirely in the view expressed by the Chief Justice.

I wish to state that having twice read through the elaborate Judgment of the two learned Judges who heard the case in the Nizamut Adawlut, and considered most carefully the analysis of the evidence contained in the latter part of the Judgment, I entertain a strong opinion that the conclusion arrived at by the Judges on the questions of fact was warranted by the evidence, and the decision pronounced on the points of law is, in my opinion, perfectly correct.

Beyond all doubt the prisoner had a fair trial, and I agree with the Chief Justice in the opinion "that the prisoner was not in any way prejudiced in his defence by the alleged irregularities."

The declaration of the Secretary of State in Council set forth in Mr. Merivale's letter, *viz.*, "that the Secretary of State could not have advised Her Majesty to grant the prayer of that Petition without previous consultations with the Government of India, which has power to pardon offences committed there," is extremely important, and, I am satisfied, will tend to remove a serious misapprehension on the part of the Native community, that Petitions for pardon in criminal cases will be entertained in England without an appeal in the first instance to the Lieutenant Governor, if necessary, from him to the Governor General in Council.

(Signed) M. L. WELLS.

The 27th November, 1862.

We are asked to give our opinion upon the proceedings held at the trial of Joykissen Mookerjee, and to say whether, with reference to all the circumstances of the

case, and especially to the Judgment of the Judicial Committee of the Privy Council, and the opinion of the Lord President as conveyed in Mr. Reeve's letter of the 30th of July, there is ground for pardoning the prisoner, or for remitting the remainder of his punishment.

Had the Judgment of their Lordships pointed out the particular parts of the trial to which their remarks were intended to apply, I should not have presumed to question the soundness of their conclusions thereon, or to set up my own opinion in opposition thereto; but as their Lordships have only intimated an opinion in a general way that "justice has not been very well administered on the present occasion," and the present enquiry is intended to ascertain whether any doubt of the prisoner's real guilt may be entertained, or whether "the prisoner has been prejudiced in his defence by the irregularities of procedure to which their Lordships' intimation is directed," I have read over the report of the trial and the papers which accompanied this reference with the view of offering an opinion upon these points.

Upon the facts of the case, as set forth on the trial by the presiding Judges, I see no reason to doubt that the guilt of the prisoner is fairly deducible from the evidence The prisoner had the advice and assistance of able Counsel, the evidence adduced against him was closely sifted and considered at the hearing, and I think, therefore, the opinion of the presiding Judges upon its character and value, and its sufficiency for the conviction of the prisoner may be safely accepted as conclusive of the prisoner's guilt. To this part of the case indeed the remarks of the Privy Council cannot be supposed to apply, as their Lordships did not allow the case to be opened on its merits, and consequently had no opportunity of judging of the propriety of the Judgment in that respect.

As to the so-called irregularities of procedure, the objections appear to me to be purely technical, and not such as could have prejudiced the prisoner in his defence in any way.

The only deviations from the usual course of procedure were the order of the Government to the Mahomedan Law Officer to hold the trial, and the order of the Nizamut Adawlut remitting the trial to the Sessions Judge to have the evidence upon the third or additional charge formally retaken in the presence of the prisoner.

It is no new feature in our procedure that the Sessions Judge in this case, directed the Magistrate to add an additional charge to the commitment, or that after doing so, the Magistrate returned the calendar without enquiring into the new charge before himself. The Circular Order of the 14th November 1851, fully recognizes the legal power of the Sessions Judge to direct the Magistrate to alter the charge in any way, previous to calling upon the prisoner for his defence; and as in this matter no discretion is left to the Magistrate, who has only to obey the direction at once, no possible advantage could be gained by the prisoner from the Magistrate first hearing the evidence before making the alteration; and as, moreover, the necessity for making such fresh charge must arise from what is stated in evidence before the Sessions Judge, or is already on the record, the prisoner must be fully aware of it, and when the charge is added, and he is called upon to plead to it, he must also know that he is required to defend himself thereon, and can always ask for time, if necessary, to produce evidence in support of his defence. Possibly it may have appeared strange to English lawyers that the Court which tries the prisoner has the power to direct a fresh charge to be added to the indictment, as under their own system, the prisoner can be tried only upon such charges as are sent up by the Grand Jury; but our system on this point clearly differs, the functions of an English Grand Jury being discharged by th-

Judge; and as the prisoner had equal opportunities of meeting and rebutting this charge before the Sessions Judge as he could have had before the Magistrate, I fail to see how the procedure followed on this occasion prejudiced him in his defence, or prevented him from clearing himself from the charge, if in his power to do so.

As to the want of formality in the appointment of the Mahomedan Law Officer who sat on the trial when the case was remanded, or the presumed want of judicial authority on his part to deliver the verdict, he did deliver against the prisoner, it appears to me that the provision of Regulation IV. of 1830 have been overlooked.

By that Regulation the Government is empowered to appoint any qualified Mahomedan to officiate as Law Officer at any trial, without appointing him to the District or Court in which the trial is held, and looking at the letter of the Nizamut Adawlut to the Government and the Government reply and directions to the Officer who did officiate in that capacity at the trial when remanded, it seems to me that under the provisions of the Regulation I have referred to, there was a sufficient appointment of the individual to render his acts on the trial perfectly legal. The question raised at the trial regarding the omission of the Law Officer to take the prescribed Oath has, I think, been fully met and disposed of in the Judgment by the presiding Judges.

As to the power of the Court of Nizamut Adwalut to remand a case that has been referred for final Judgment and sentence for further evidence, I believe such procedure is not without precedent, and in support of the existence of such a practice, I will quote the opinion of the Law Commission in 1848, which, upon such a point, is so far an authority, that the object of drawing up a new Code of procedure, authentic reports of the then existing procedure from all the Courts of the country. In paragraph 106, the Commission observes that, "the existing Laws of Bengal and Madras expressly authorizes the Sudder Courts in trials for murder referred to them, to require further evidence if they see occasion, and it is understood that it has been the practice to direct further evidence to be taken occasionally in trials for other offences also." It is possible, therefore, that the practice is not without precedent in the late Sudder Court, though not being directly sanctioned by law, it has probably been followed only on rare occasions. The question then seems to resolve itself into this,—Was the present case one in which this course was justifiable, or did it act unfairly towards the prisoner and prejudice him in his defence? Upon this point I entirely agree with the Chief Justice that the prisoner was in no way prejudiced by the proceeding, that it is evident from his allowing the chief part of the evidence previously taken to be read over in his presence, only cross-examining the witnesses and offering no fresh evidence in his own defence. The remand of the case brought to light no new facts against the prisoner, and was merely intended to clothe with legal formality what was already in substance on the record, and upon no ground, but the most purely technical, can objection be taken to it. As the object was merely to supply a form and not to impart new substance into the case against the prisoner, I think the order of the Court was justifiable, and that no valid objection is made out.

To my judgment, then, no reason exists on the ground of misconception either of law or fact to call for the extraordinary interference of the Government in favor of the prisoner, and I, therefore, do not recommend either pardon or remission of the sentence passed upon him.

(Signed) H. T. RAIKES.

The 30th December, 1862.

The objection of the prisoner, which relates to his claim to be exempted from trial by the Mahomedan Law Officer, is only one of those raised by him which seems to me to have any real weight in it; but his objection on this ground appears to me valid.

Section 5 Regulation VI. of 1832, says—"That any person not professing the Mahomedan faith when brought to trial may claim to be exempted from trial under the provisions of the Mahomedan Criminal Code."

The prisoner Joykissen had been tried on a third count, added by the Judge himself, and his case came as a referred one for final orders to the Nizamut Adawlut.

This Court, finding that it could not regard the trial as legally complete upon the additional count, remanded the case to the Sessions Judge for further investigation, then it was that the prisoner demanded his exemption from trial by the Law Officer and the question is,—Was the demand, with reference to the stage when it was made, in time or not?

The directions made by this Court on the remand were that the Sessions Judge was to retake the evidence of the witnesses as to the third count in proper legal form, &c., &c. This was to all intents the order for the conduct of a new trial and, inasmuch as objection was taken against the trial being held in presence of the Law Officer before the re-trial actually commenced, it entitled the prisoner, both by the letter and spirit of the Law, to exemption from trial by the Law Officer.

Had the prisoner then been tried by any of the other prescribed forms of trial, his fate would have been entirely in the hands of the Sessions Judge, and it is plain he would never have been convicted.

Holding this view, I cannot but join those colleagues who have recommended the prisoner to pardon.

(Signed) C. STEER.

The 12th January, 1863.

This case has been forwarded to the Judges of the High Court by the Lieutenant Governor of Bengal, with a request that the Judges or any of them would favor His Honor with such remarks as they may desire to make thereon, and also that they would furnish him with their opinion as to whether, with reference to all the circumstances of the case, and especially the Judgment of the Judicial Committee of the Privy Council, and the communication made by the Lord President by Mr. Reeve's letter of the 30th July 1862, to the Secretary of State for India, there is ground for pardoning the prisoner, or for remitting the remainder of the punishment.

The Lords of the Judicial Committee say that "they are inclined to come to the conclusion that justice has not been very well administered on the present occasion, and supposing it to be a civil case and not a criminal case, they would have no hesitation whatever in recommending to Her Majesty to allow an appeal for the purpose of considering these proceedings and of doing justice to the party complaining. Admitting that this *primâ facie* and presumptively is a case of great grievance. And not at all forgetting that injustice may have been done in this individual case, and that the power of the Crown may be invoked in another shape, and that that injustice may be remedied. They do not doubt that justice will be done because they would suggest that an application should be made to the constituted authorities who have the power to afford a remedy. They doubt not that when it is represented to the Authorities that this suggestion emanates from the Judicial Committee, they will not be loth to examine into the circumstances of the case and to do that which justice may require."

This language, which is that of the highest Court of Appeal from the Courts of this country, appears to me to be as clear an expression of opinion as the Court properly express, bearing in mind as I do, that the points relating to the validity of the conviction had not been argued on behalf of the Crown, and that the Court did not intend to decide the question of its validity. It leaves the Judges to whom this question has been referred, free to consider whether such opinion was well founded, and on what grounds it proceeded notwithstanding the previous decision of the case by the Nizamut Adawlut, the Supreme Court of Appeal in this country, and it sets me free from the difficulty under which I should otherwise have labored in expressing opinions at variance with the conclusions of so high an authority. I, therefore, proceed to state what appears to me to be the grounds on which the opinion of the Privy Council may have been founded.

The first question which it is necessary to consider is,—Whether under Regulation II. of 1807, Section 4, Clause 3, the prisoner could have been rightly convicted on the Indictment, as originally framed, upon evidence leading to the inference that he did not himself fabricate the Pottah, but caused it to be fabricated. On this point I think the decision of the Sessions Judge and of the Nizamut Adwalut on the 9th July 1861, were right, and in accordance with the course and spirit of the decision both here and in England *Loom's case*, Moody's Crown cases 160, and *Puddyfoot's case*: I Moody 247; are illustrations of the strictness of proof required in criminal cases; this strictness has arisen from the determination of the Courts to give the fullest effect to the rule of law and principle of justice that no prisoner shall be convicted upon any other charge than that which he is called upon to answer by the distinct and specific statement in the Indictment. The added court was then a new substantive charge, and was so treated not only by the Judge, but by the Nizamut Adwalut. The Sessions Judge appears to have sent the Calendar to the Committing Magistrate with an order directing him to add the count against the prisoner for causing or procuring the forgery of the Pottah, and to recommit the prisoner for trial upon such additional charge. The Magistrate amended the Calendar by adding the count, and sent back the Calendar so amended to the Court of the Sessions Judge. Neither the prosecutor nor his Counsel went before the Magistrate, nor was any evidence taken before him upon the additional charge. The prisoner was not taken before the Magistrate, and had no opportunity of answering the charge before the Magistrate. The Circular Order of 14th November 1851, contemplates two things,—*first*, "An alteration of the charge by the Sessions Judge on comparing the written charge with the facts of the case as stated in the Magistrate's roobocaree of commitment"; *secondly*, "If the alteration should be required to be made on the facts of the case as derived from the evidence taken and well established by *the Sessions Judge* (this being a power to be exercised only on the plainest and strongest grounds) the proceedings in the trial should at once be stopped, and the case remanded to the Magistrate with the necessary directions for a fresh commitment. The *case* is to be remanded to the Magistrate. The whole case to be sent back from the Judge's Court to that of the Magistrate. The Circular Order does not contemplate that the Magistrate is to do the merely ministerial act of making an amendment dictated by the Judge. He is not to commit without hearing the evidence, or putting the prisoner to answer. The Magistrate should have proceeded to hear the case and commit the prisoner, if he thought such re-commitment warranted by the evidence taken before him, viewing it in accordance to the directions of the Sessions Judge. In the present case there was no recommitment at all. The want of a proper commitment appears to me not a mere matter of form. If it is so, I would say in the words of the Circular Order of the Nizamut Adwalut of the 22nd of February 1838, that "even matters of mere form when connected

with a criminal trial in which the character, liberty, and often the life of an individual depends assume a degree of importance which on a superficial view of the subject they might not appear to possess." The prisoner was necessarily prejudiced; he was deprived of the chance of getting the new charge dismissed by the Magistrate and of the time which the law would have given him to prepare his defence to it, and of the opportunity of having the evidence of any witnesses against him to be taken on the third count before the Magistrate compared with the evidence of such witnesses as given before the Sessions Judge under Regulation IV. of 1797, Section 7, Clause 7. The power of a Sessions Judge under Regulation VII. of 1831, Section 4, appears to be simply to try commitments made by Magistrates, and, see Beaufort's Criminal Law, Section 1318, except in the single case provided for by Act I. of 1848, Section 4, I see no trace of any power in the Sessions Judge to try prisoners committed by himself. In fact Regulation IV. of 1823, had provided that no Judge of circuit should try any person committed for trial by himself in the capacity of Superintendent of Police, Magistrate, Joint Magistrate, or Assistant. If I am right in concluding, as I do, that there was no lawful or proper commitment or charge before the Sessions Judge on the third count, the Sessions Judge was without jurisdiction in respect of the charge contained in it. And if that is so, the principle that no consent on the part of a prisoner can give to a Judge jurisdiction in a criminal case applies. And the fact that the prisoner pleaded to the amended Calendar will, therefore, not prejudice his right to call in question the propriety of the conviction. Indeed I hardly understand what is meant by waiving objections in criminal cases. Without saying that a prisoner cannot waive objections if he expressly agrees to do so, there are very few, if any, cases, in which waiver of irregularities ought to be presumed against a man who stands at the bar of a Criminal Court to defend his life or his liberty from mere omission to take an objection in the anxiety, terror and confusion of mind, which such a state of circumstances must produce.

The trial upon the added count was wholly irregular. The witnesses were resworn and no evidence was given upon it. One of the protections which the law gives to a party on trial for a criminal offence is that the witnesses shall give their evidence under the sanction of an oath, and subject to the liability to be indicted for perjury if they give false evidence upon any material point. Now if the evidence given before the amendment is treated as applicable to the third count, it is clear that, in respect of evidence which was material to the issue on the third count, and which in fact may have led to the conviction, the witnesses may have given evidence without having been subject to this liability to be indicted for perjury. Therefore, the prisoner ought not to have been convicted on the third count, but was entitled to an acquittal upon that as well as the other two counts, upon the ground that no legal evidence was given in support of it.

The Law Officer, however, delivered his Futwa, finding the prisoner guilty on the third count. The Judge disapproved of his finding on that count, and, therefore, proceeded to complete the trial and transmit to the Nizamut Adawlut a copy of all the proceedings with a separate letter stating the grounds of his disapproval. The Court on the 9th of July 1861, passed an order as follows:—"We remit the record to "the Sessions Judge with directions that he will retake the evidence of the witnesses "as to the third count in proper legal form, and having conducted the *whole trial* on "that count, with the assistance of the Law Officer who sat with him if he be still there, "and if not with his successor, pass on the prisoner whatever sentence may eventually "seem just." This order is said to be without precedent in the Courts of this country by the Court itself which passed it. I have searched for a precedent of such an order without success, and I certainly entertain serious doubts whether, under

the circumstances of this case, where the prisoner has been put on his trial on an Indictment regularly commenced and free from error he could under any circumstances be lawfully put in jeopardy a second time for the same offence. Many cases on this subject are to be found in Hawkin's Pleas of the Crown Book 2, Cap. 35 and 36, Section 10 and Russel on Crimes Vol. I, page 829, and I Chitty's Criminal Law, page 452. It is clear that the only ground on which the prisoner could be tried again on the third count is that the former trial on that count was on a charge so defective that the prisoner was never in peril upon it. Whether the Nizamut Court had any power to remit the charg e has been considered by Sir Charles Jackson. In England in cases of felony and treason no new trial can in any case be granted. In cases of misdemeanour a new trial cannot in general be granted *on the part of the prosecutor*, after the defenda nt has been acquitted even though the verdict be against the evidence I Chitty's Criminal Law, 654 and 657. The same principle appears to me to apply to a proceeding in a Court of Appeal, where it appears that a prisoner is entitled to an acquittal on the ground that no legal evidence was given in support of the charge.

Amongst the many other irregularities in this case was the absence of a proper re-appointment of the Law Officer, and the fact that he had not taken the oath of office. These points have been discussed at length by Sir Charles Jackson; I agree in the conclusion at which he has arrived, and, therefore, it is not necessary that I should allude further to them.

When brought to trial on the second occasion, the prisoner being a person not professing the Mahomedan faith exercised his right to claim exemption from trial under the provisions of the Mahomedan Criminal Code, and that right was denied him in direct contravention of the express words of the Regulation VI. of 1832, Section 5.

The Nizamut Adawlut had *no power* by its order of the 9th of July 1861 to deprive the prisoner of the right given to him by the Regulation in question. The case could only be remanded on the supposition that no valid trial of the charge contained in the third count had ever taken place. The trial, and the only trial on the third count was the second trial, and on that trial the prisoner could not be prejudiced by any thing which took place on the former illegal and invalid trial of the issue on that count.

I may observe that nothing is better settled in English Law than that, after a rule *nisi* for a new trial has been made absolute, a party may have his case tried by a special Jury as a matter of right, though the first trial had taken place before a common Jury.

If the matter rested with me I should advice the Lieutenant Governor that the prisoner should be pardoned upon the ground that he has never been legally tried or properly convicted on the third count and that on the only legal trial which has taken place, *viz.*, the first trial, he was entitled to an acquittal upon all the charges made against him.

(Signed) JOHN PAXTON NORMAN.

The 16th December, 1863.

The question which the Lieutenant Governor has asked is not whether the prisoner has been duly convicted of procuring a forgery, which was the question before the Sudder Court, and which was also one of the matters brought under the consideration of the Judicial Committee of the Privy Council.

What we are now asked is " Whether, with reference to all the circumstances of the case, and especially to the Judgment of the Judicial Committee of the Privy Council, there is ground for pardon or remission of punishment ?"

This is not *merely* a question of Law. His Honor does not, as I read the Secretary's letter, mean to ask the Court whether the case argued and determined by the Court (the Sudder Court) in March last was legally adjudged. The question asked is, Whether there is ground for a pardon? In answering which we may advert to other considerations than the strict legal grounds on which the convicton has proceeded.

For instance, one objection made on the prisoner's behalf was that the Mahomedan Law Officer was not duly authorized to act on the second trial. In point of strict law this objection may be sufficiently answered by saying that the Law Officer who sat on the trial was in fact a Law Officer who had been appointed by Government, and that notwithstanding this Officer may have acted irregularly or unlawfully by reason of his omission to take the oath or declaration of Office, still having acted as Law Officer his Futwa was valid. But, if the law requires a Judicial Officer to enter on his duties under a certain solemn sanction, and at the same time tells those whose lives and liberties are in his hands "this is no affair of yours, his Judgments are, for you, as just as they would be if he had been duly sworn," it seems to me (in such a state of the law,) that an objection like this deserves to be considered, among other matters, in answering the Lieutenant Governor's question.

Again, there is doubt and difference of opinion as to the validity of the appointment of this Officer (on the second trial). He may have been (as I think he was) duly re-appointed, but if this is fairly doubtful, we ought not to disregard such doubts.

As to the proceedings generally, I venture to make the following remarks:—

On the first trial, at the close of the case for the prosecution, it was thought necessary to adopt the formal charge to the evidence which had been given. It was considered, I presume, that the evidence against the prisoner tended to support not a charge of forgery or of uttering, but a charge of procuring forgery. Under the former procedure the Judge instead of altering the charge by addition or otherwise, either at the request of the prosecutor or on his own motion, would probably have acquitted the prisoner. But by the Circular Order of 1851, the Judge, at the time, when this trial took place, had power ("to be exercised only on the plainest and strongest grounds,") at once to stop the proceedings in the trial and to remand the case to the Magistrate with the necessary direction for a fresh commitment. What was done under this Order may perhaps have amounted to a literal compliance with its terms; but was the Order in substance obeyed? It is true the proceedings were stopped for some short time, sufficient apparently to enable the Magistrate to add a postscript of a few words to the instrument of charge, on the return of which the prisoner was forthwith called upon to plead, and did plead "not guilty" to the several charges; and the next step was the examination of witnesses for the defence. The rescission of the Circular Order of 1848, and the introduction of a different practice, could hardly have been intended to authorize this summary mode of adding a new charge to those already framed against the accused person.

* "With regard to the alteration of "charges of Sessions Judges, the Court "directs these Officers to abstain in "future from having them modified "merely because the case involved a "higher offence or a different one "from that charged. In the trial of "a case a Sessions Judge exercises "only Judicial functions, and has "nothing to do with the framing of "charges on which the prisoners are "committed. If the evidence will not "sustain the particular charge of "which a prisoner is accused, it is his "obvious duty to acquit him; and it "will rest with the Magistrate to re-"commit him on an altered charge" &c., &c. (See Circular Order No. 15, dated 7th July 1848).

It is, I believe, an important principle of criminal jurisprudence to afford a prisoner foreknowledge and accurate knowledge of any charge upon which he is to be tried He has a right to know not only all the facts which he is enabled to know by his

presence before the Magistrate at the time of the preliminary investigation of his case, but further what is the offence which these facts are said to show. The prisoner had these rights, I believe. If the law allows a charge to be drawn up at the close of the evidence for the prosecution, it seems to me that bare justice and the safety of all persons (the innocent as well as the guilty) demand that a due and orderly procedure should be followed so as to ensure by means of some fixed rules and not by the arbitrary opinion of the presiding Judge, that the accused person shall not be deprived of any just means of defence. The course of proceeding at the first trial on the charge of procuring the forgery of the Pottah was as follows:—*First*—The evidence was taken, then the charge framed, and a fresh committal made; the prisoner was then called upon to plead and did plead not guilty, thereupon the evidence in support of his plea was heard; and after the addresses of Counsel on both sides the Court delivered its opinion. I see no reason to think that in this particular case the addition of the cognate charge of procuring forgery caused any prejudice to the prisoner in his defence; but I, nevertheless, think that such serious irregularities of procedure are proper for our consideration in determining the answer which should be given to the Lieutenant Governor.

The greater part of these proceedings were set aside by the learned Judges when the record was remitted for the trial of the third count. I do not say that their order, remitting this charge and subjecting the prisoner to a second trial, was illegal; but it was, I believe, novel if not unprecedented.

The refusal of the Court to allow the prisoner, when brought to trial, the right given to him (as I think) by Section 4, Regulation VI. of 1832, is another weighty matter of objection.

Looking at the whole of the proceedings and adverting to what (as I read the Judgment of the Judicial Committee of the Privy Council) was the opinion of their Lordships on these proceedings, I would send for answer to the Lieutenant Governor that there are grounds for granting a pardon.

I have not considered whether the evidence establishes the guilt of the prisoner. I have had no opportunity of doing so.

I should have been glad if His Honor's question could have been considered at a meeting of the Judges, rather than by each Judge singly, and apart, and (in my own case at least) hurriedly. I have forwarded the papers without delay.

(Sd.) W. MORGAN.

The 1st January 1863.

I have carefully read and considered the papers connected with this reference, as also the opinions of my learned colleagues.

The following objections to the legality of the trial of the prisoner Joykissen Mookerjee on the third count of the Calendar suggest themselves to me:—

1*st*.—That as the record of the case was remitted by the late Sadder Nizamut Court to the Additional Sessions Judge of Hooghly with directions to *retake* the evidence of the witnesses as to the third count in proper legal form, and after conducting the whole trial on that count, to pass a just and proper sentence, this was to all intents and purposes a new trial, and the prisoner was clearly entitled to claim and avail himself of the privilege conferred upon him by Section 5, Regulation VI. of 1832, of exemption from trial under the provisions of the Mahomedan Law.

2*nd*.—The Law Officer before whom the second trial was held was never duly re-appointed or appointed Law Officer of the Hooghly Court; he, therefore, acted wholly without, and not with simply defective, jurisdiction; the Futwa delivered by him is, therefore, null and void.

I cannot read the letter of the Officiating Under Secretary to the Government of Bengal, No. 2,443 B, dated the 17th October 1861, as a re-appointment of the Moulvie Fyezoollah to the office of Law Officer of the Hooghly Court, or as a special appointment to officiate in that capacity, such as is contemplated in Section 2, Regulation IV. of 1830, for the letter conveys no appointment substantive or officiating.

It also appears that, in addition to the Moulvie having acted wholly without jurisdiction, he did not make and subscribe the solemn declaration in lieu of an oath prescribed by Clause 2, Section 2, Regulation XVIII. of 1817, previous to entering upon the discharge of his functions.

Much stress has always been laid upon the due observance of all the formalities prescribed by the Regulations connected with the appointment of Mahomedan Law Officers; indeed up to the year 1817 a Mahomedan Law Officer was required to take and subscribe on oath on the 1st of January and 1st of July of each year. For the above reasons, I submit that the Court before which the prisoner was tried on the third count was not a legally constituted Court; that there has been a mistrial and a denial of a privilege to which the prisoner was legally entitled to claim.

(Signed) F. B. KEMP.

The 2nd January 1863.

This case, the complete papers in which only reached me late on the evening of the 2nd instant, has been so fully sifted by the other Judges, that, without going into its history, it only remains for me to take up the points on which, as I read the case, our opinion can be required with a view to enable the Lieutenant Governor to determine whether he shall grant a pardon, or remit any portion of the sentence.

Now the points on which either stress has been laid either by the prisoner or his Counsel, or which appear to be deserving of any consideration whatever, are the following:—

1*st*.—The irregularity in the return of the Calendar by the Sessions Judge to the Magistrate for the addition of a third count.

2*nd*. The irregularity in the re-appointment of the Law Officer after the case had been remanded by the Sudder Court.

3*rd*. The claim of exemption from trial by a Mahomedan Law Officer made by the prisoner, as a Hindoo, under Regulation VI. of 1832.

4*th*. The remand of the case by the Sudder Court in July 1861 for the purpose of having evidence taken, when the state of the case would have naturally rendered the prisoner entitled to the benefit of an acquittal.

As regards the first point, I agree with those of my colleagues who think that there was no irregularity sufficient to vitiate the trial in the mode in which the additional count was added. It is justified by precedent. It caused no sort of prejudice to the prisoner in his defence. It is almost, as it seems to me, abandoned by the prisoner himself in his petition to the Privy Council, paragraph 34, clause 6; and it cannot form any ground for interference with the sentence, as on a trial and commitment not legally made.

On the second point, as to the irregularity in the re-appointment of the Law Officer, it is clear to me that the letter of the Government of Bengal, by which, no doubt, it was intended to re-appoint the Law Officer, was somewhat loosely drawn up;

but I hold that Mr. Justice Raikes has effectually disposed of the objections raised on this head, by reference to the provisions of Regulation IV. of 1830, which are very clear, which expressly meet a contingency of this kind. Reading that Regulation and the letter of the Government of Bengal together, I can have no doubt whatever that the Law Officer was regularly appointed to sit on the trial, and that this point is invalid.

The third objection is that on which the learned Counsels, Messrs. Bovil and Hannen, lay the most stress. This part of the case is rendered somewhat more difficult by the fact that the exemption under Regulation 6, of 1832 was not claimed by the prisoner, until he had discovered what the opinion of the two Judges who sat on the trial was, namely, that the Mahomedan Law Officer was for conviction, while the Sessions Judge was for acquittal. But, on the whole, I am inclined to agree with Mr. Justice Norman, and to think that as the case had been remanded, the prisoner was entitled to be placed in the same situation as he would have been on the first trial. In this view, I think, he was then entitled to claim his exemption, and that the claim ought to have been allowed.

On the last point, I am not satisfied with the authorities quoted in support of the remand for the evidence to be taken, though bearing in mind that it is contended that the effect of the remand was not so much to search for new evidence, as to give evience, already on the record, its proper legal form.

I think, if there were no legal evidence to support a charge for which the calendar had been already sent back, the prisoner, in point of law, was entitled to his acquttal; and taking this objection, with objection No. 3, as to the claim to be exempted from trial before a Mahomedan Law Officer, that third objection derives additional weight therefrom. If the evidence was not legally sufficient, then the order for remand was, to all intents and purposes, an order for a new trial, and on a new trial the prisoner had a right to claim any privilege or exemption, to which he was originally entitled.

I entirely concur with the learned Chief Justice that it is not intended that we should go into the facts or discuss the evidence. I must hold that there is nothing on any part of the proceedings which could justify such a course.

Neither can I for a moment imagine that the position, rank, or numerous charitable or benificent acts of the prisoner, could form any reason for our recommending a pardon, still less a remission, of any part of the punishment. Justice, in such a case, can recognise nothing in the way of a set-off. All we have to consider is whether the errors in Law alleged against the conviction are sufficient to warrant an interference with the sentence.

Thus, looking to the judgment of the Privy Council, to the remarkable admission of the Counsel who appeared before that body to support the conviction, taking also the third and fourth objections together, and having given this case my best attention, I have come to the same conclusion as that arrived at by my Hon'ble Colleagues noted in the margin, that grounds do exist whereon His Honor the Lieutenant-Governor may remit the remaining portion of the sentence, as on a conviction, erroneous in Law.

Sir Charles Jackson.
Mr. Justice Norman.
Mr. Justice Morgan.
Mr. Justice Kemp.

(Signed) W. S. SETON-KARR.

The 6th January, 1863.

These papers have been sent to us with a request, on the Lieutenant Governor's part, that we should communicate to him any remarks in the case of Joykissen Mooker-

jee which we may desire to make, and also that we should give an opinion whether any ground is apparent for pardoning the prisoner, or for remitting the remainder of his punishment.

As it appears that nothing was argued before the Judicial Committee of the Privy Council, but the simple question whether or not they should admit the appeal, I can regard their Lordships' Judgment only as the occasion of the Lieutenant Governor's reference to us, and not as matter which ought to influence our opinion.

The grounds upon which a pardon could be recommended, must be either the manifest innocence of the prisoner, or else the occurrence of irregularities in the trial, by which he was really prejudiced.

It cannot, I think, be denied that the guilt of the prisoner was fairly deducible from the evidence before the Court which tried him. I conceive there would be great inconvenience in our expressing any opinion beyond this on the merits of the case, and I, therefore, abstain from going further into that division of the subject.

Upon the legality of part of the proceedings I perceive some diversity of opinion among the Judges who have preceded me, and I admit there is room for doubt.

The questions upon which, it seems to me, doubt may arise, are these :—

1*st*.—Was the prisoner entitled to an acquittal upon the record as it stood at the time of first reference by the Sessions Judge, and were the orders then passed by the Nizamut Adwalut beyond the competency of that Court?

2*nd*. —Did the procedure then directed by the Nizamut Adawlut amount to a new trial, and was the prisoner, at that stage of the proceedings, entitled to claim exemption from trial before the Law Officer, under Regulation VI. of 1832?

3*rd*.—Was the Court of Session, when the trial was completed, a properly constituted Court?

The other objections appear to me purely technical.

Upon the first of the points above indicated, my opinion is, that the orders of the Sudder Court were justifiable, and in accordance with the Law of criminal procedure then prevailing in Bengal.

I think the powers and duties of the Court were the same in all cases referred to them, whether on the ground of difference of opinion between the Sessions Judge and Law Officer, or by reason of the Sessions Judge not having authority to pass final orders in the case.

Many instances might be adduced in which the Nizamut Adawlut having to pass final judgment in a trial has remitted the case, in order that more evidence against the prisoner might be recorded, for that in effect is the meaning of a remand for "further inquiry" in cases where the want of evidence on particular points has left the case against the prisoner incomplete.

There is rather a strong case of this description at page 245, in the 1st volume of the Select Nizamut Reports.

That case, one of murder, record went back twice for further evidence, and a third time in order that the defence of the prisoner might be retaken upon the additional evidence so obtained.

The principle is just the same where admittedly insufficient evidence, and where no legal evidence at all has been recorded, for the prisoner would be, in either case entitled to an acquittal, unless the Court had the power to complete the case against him by admitting fresh evidence.

Nothing but embarrassment can arise from discussing these questions without a previous careful study of the Bengal system, which differs in so many respects not only from that of England, but other known systems. Even the use of English Law terms is apt to mislead. I find no authority for the contention that in trials referred by the Sessions Judge, disapproving of his Law Officer's Futwa the Nizamut Adawlut was a mere referee, bound to decide on record before it.

The Court was not merely the highest tribunal in criminal cases, but was "empowered and directed to take cognizance of all matters relating to the administration of justice in Criminal cases and the Police of the country," and was to "exercise all the powers that were vested in it, when it was stationed at Moorshedabad and superintended by the late Naib Nazim, the Nabob Mohamed Reza Khan."

Regulation IX. of 1793. Section 72.

Section 73.

These powers were of the most extensive kind, and we are not to look to the Regulations, nor even to the decided cases for the measure of that Court's jurisdiction; for neither of these provided for anything the variety of questions which might arise.

The Nizamut Adwalut was declared to be "empowered to prescribe the forms and conduct to be observed by the Courts of circuit and the zillah and city Magistrates."

By Regulation X. of 1796, Section 3.

It had been over and over again decided, and it was a settled part of the Criminal practice of Bengal that a Sessions Judge might call and receive fresh evidence for the prosecution at any time before closing the proceedings, provided that the defence of the prisoner were taken *de novo* upon such evidence: and it certainly followed that the superior Court could do the same, for in a case referrible to the Nizamut Adwalut the taking of the Futwa in the Zillah Court did not necessarily close the proceedings, as in the precedent at page 10 of the 5th volume of the Nizamut Reports; where further evidence favorable to the prisoner having been discovered after the reference of the trial to the Nizamut Adwalut, that Court cancelled the Futwa, and directed the case to be re-opened.

The Court, moreover, has always exercised the power of quashing the proceedings at a Sessions trial for any material defect, and ordering a new trial; and I, therefore, think the orders passed in this case could be justified, whether they were regarded as directing a new trial, or merely as directing evidence for the prosecution to be taken.

Upon the second question, I was at first of opinion that the remanding order amounted to an order for a new trial, and if a new trial had been ordered, I incline to think, that the prisoner's claim to be tried under the provisions of Regulation VI. of 1832, must have been allowed.

But on reference to the Court's order, to the correspondence which took place between the Court and the Sessions Judge, and to the Judge's letter sending up the case for the second time, I am satisfied that not a fresh trial but the completion of a trial already begun was ordered. It may be remarked that the trial was to be held "with the assistance of the Law Officer who sat with him, if he be still there, and if not, with his successor," which might seem to imply a new trial *ab initio*"

But the procedure then existing provided for the completion of a postponed trial, at a subsequent Session, by a new Judge, or Law Officer, or both, Circular Order Nizamut Adwalut, No. 111, dated 2nd April 1812, Cavrau page 41.

The proper time for a person not professing the Mohamedan religion to assert his right of exemption from trial under the Mohamedan Code was the time of being

"brought to trial," that is to say, when brought before the Court and arraigned to that a prisoner who had once pleaded and thereby submitted to be tried before the Law Officer could not at a late period of the trial object to that Officer's jurisdiction.

I observe it is reported in the Sessions Judge's letter of reference dated 23rd December 1861, paragraph 3, that the prisoner's Counsel, further applied that "he might be called upon to plead to the indictment."

In order to place the fact beyond a doubt, I requested our Register to ascertain distinctly from Mr. Lillie, the Judge who held the trial, whether the prisoner had been so called upon to plead. Mr. Lillie's answer, which is in the box, is conclusive on the point, and it is clear enough that the application was made with the express hope of being able to claim the exemption in proper form.

I, therefore, think the objection founded upon Regulation VI. of 1832, to be invalid.

The third objection relates to the constitution of the Court before which the prisoner was tried, and is based first, upon the alleged non-appointment of the Law Officer; second, on the fact that this Officer, if appointed, had not duly made the prescribed affirmation before entering on the duties of his office.

I am decidedly of opinion that the Law Officer was sufficiently re-appointed for the purpose of this trial, and that, as pointed out by Mr. Justice Raikes, Regulation 4 of 1830, was passed expressly to remove any doubts as to the legality of such appointments.

I prefer putting my opinion on this broad ground, although it might very possibly turn out that the Law Officer had never actually resigned his office at Hooghly, and was merely on deputation at Jessore.

The fact that he was addressed in the Under Secretary's letter as a late Law Officer, and signed his Futwa in the same way appears to me immaterial. What we have to consider is whether he was substantially appointed, and whether the Sessions Judge, finding him *de facto* Law Officer for the purposes of the trial, rightly associated the Moulvie with himself to try the prisoner.

It seems to me that both these questions ought to be answered in the affirmative.

The Moulvie's omission to take the oath or declaration does not, I think, affect the validity of his judicial acts. I understand this to be settled in England as well as here, and an instance occurs to my recollection in which it was discovered that certain Judges of Small Cause Courts invested with the powers of principal Sudder Ameen in the Zillahs of Jessore and Nuddeah, had been exercising these functions without having first made the prescribed oath or affirmation. The matter being reported to the Sudder Dewany Adawlut, that Court decided that the functionaries in question should at once take the oath of Office, and remarked that the omission would not invalidiate their previous acts. I, therefore, think that the Court, before which Joykessen Mookerjee was tried was legally constituted and had jurisdiction to try him, and also that the proceedings of the Sudder Court and of the Court of Sessions after the remand, were in substantial conformity with Law.

And, referring to the remark which I have above made as to the propriety of going into the merits of the case, I see no ground on which we ought to recommend the prisoner to be pardoned.

(Signed) LOWIS JACKSON.

The 10th January, 1863.

I imagine that we are not required to express an opinion on the technical question connected with the Law existing in Bengal at the time of this trial, and if we were, I should neither feel qualified to do so, nor should I be justified in *detaining* the papers for the purpose.

The only question appears to be, Whether any real substantial injustice has been done or risk of injustice incurred?

I venture to feel confident, in concurrence with the learned Chief Justice, that all the objections taken are mere technicalities with the exception of the claim to exemption from trial before the Mahomedan Law Officer. Regarding this last, I have had some doubt. Upon the whole, looking to the analogy both of the English Law and of the Code of Criminal Procedure, I do not think that in the first trial the prisoner was really at all prejudiced by the omission to re-examine the witnesses for the prosecution after the third count was added. The Procedure Code lays down that, in case of amendment or alteration of the charge, the Court may proceed immediately with the trial, provided the accused is not likely, in the opinion of the Court, to be prejudiced thereby; and, further, (Sec. 247) in all cases of amendment, &c., "the accused person shall be allowed to recall and examine any witness who may have been examined."

I have no doubt that these provisions are in accordance with substantial justice. I think that the accused in this case was not prejudiced by proceeding with the trial, and it appears to me to be evident that the accused having proceeded with his defence and called his own witnesses without having expressed any desire to re-examine the previous witnessess, he doubtless did not desire to do so, and if he had, the Court would have allowed to do so.

In this respect, then, there seems to have been no substantial injustice in the first trial. But the learned Judges who remanded the case, having declared that the Bengal law required a further hearing of the evidence, I think that we must consider them to have been also more qualified than we can be to declare on what terms a remand could and should be granted; and that, as they thought fit not to order a new trial, but only to order further evidence to be taken in continuation of the first trial, legal objection to the further proceedings in the form first adopted, cannot properly be taken. I consider the first and second inquiry to form one trial.

But again, looking further to the substantial justice of the case and to the people and practices of this country, I am very much convinced of this, that the old procedure, under which the case was tried, was eminently unsatisfactory in two particulars, *viz*:—

First.—That no tribunal could possibly be less suited for the trial of such a case than that of a Mohamedan Law Officer; and *second*, that in respect to difficult questions of fact, the decision of the very best Judges trying the case upon the record only without any actual examination of the witnesses and parties, is extremely fallible, and that a conviction upon the record in opposition to the opinion of a good Judge (and I believe the additional Judge in this case to have been a good Judge, actually trying a case of such doubt and difficulty, and surrounded by so many influences, leaves some doubt upon the mind.

Thinking, then, that the case should never have been tried by a Law Officer, and that the objection of the prisoner to that procedure, though not technically in time, was founded on reason, seeing also that the opinion of the Law Officer was known and inevitable when the further enquiry took place, I cannot but feel that it would have been satisfactory, more calculated to ensure the interest of justice, if when ordering a further inquiry, the Judges had (not as a legal objection, but in the exercise of discretion) directed an entirely new trial before a more fit tribunal.

Upon the ground, then, that the system of procedure and the tribunal by which the prisoner was tried and convicted were not very satisfactory, and that both Members of the Judicial Committee of the Privy Council and several of the Judges of their Court incline to that opinion, I venture to subscribe my name to the opinion that there is so much doubt of the justice of the case, that the Lieutenant Governor might be advised to give the benefit of it by pardoning him.

(Signed) G. CAMPBELL.

The 13th January, 1863.

The Judges of the High Court have been required by His Honor the Lieutenant Governor, in the letter of the Secretary to Government, to the address of the Registrar of the High Court, No. 4114, dated 6th November 1862, to give their opinion "as to whether, with reference to all the circumstances of the case of Joykissen "Mookerjee, and especially to the judgment of the Judicial Committee of the Privy "Council, and the opinion of the Lord President, as conveyed in Mr. Reeves' letter of "the 30th July, there is ground for pardoning the prisoner, or for remitting the re- "mainder of his punishment."

The terms used by the Government Secretary seem to be identical in meaning with those used by the Secretary of State for India in his letter No. 70, dated 8th September 1862, to the address of his Excellency the Right Hon'ble the Governor General in Council, in which the Secretary of State remarked that the Governor General in Council, on receiving the expression of the sentiments of the Judicial Committee of the Privy Council, will consider whether this is not a proper case for the exercise of the powers vested in him under Act 18 of 1855, if he should be of opinion *either that doubt has been cast on the real guilt of the prisoner, or that the prisoner was prejudiced in his defence by the irregularities of* procedure to which their Lordships' intimation is directed.

As one of the Judges who heard the case of Joykisen Mookerjee in the late Sudder Court, I have already in the Judgment put on record my opinion as regards the so-called irregularities of procedure, and also as regards the sufficiency of the evidence to establish the guilt of Joykissen Mookerjee. At the call of Government, I have reconsidered both the one and the other and as briefly as possible proceed to state the conclusion at which I have arrived.

In determining whether the alleged irregularities of procedure are really irregularities, I have confined myself to the simple question whether they are so *under the system of Criminal Procedure which prevailed in Bengal until the enactment of Act* 25 *of* 1861 ? and have not attempted to test the legality of the proceedings in a trial in Bengal by the strict technical English system of Criminal procedure.

The main objections raised to the proceedings in the Courts in this country seem to be the following:—

1st. That the Sessions Judge of Hooghly had no authority to direct the addition of a new crime to the calender.

2nd. That even if he had, the failure by the Magistrate to make a regular commitment under the Law vitiated the trial on the counts so added.

3rd. That the Moulvie was not re-appointed in proper legal form as Law Officer of Hooghly, and therefore the trial was *corom non judice*.

4th. That the omission by the Moulvie of his appointment be held good to take the oath prescribed by Law vitiated the trial; and

5th. That the remand of the case by the late Sudder Court for the taking of evidence was illegal, and prisoner was entitled to a judgment on the record as it stood; but even if the remand were legal, the order of remand to take evidence was equivalent to an order for a new trial or if it were not a new trial as every thing already done was quashed, the prisoner stood before the Court as if he that every day had pleaded not guilty; that, consequently in either one case or the other, he was in time in claiming his privilege that, under Regulation 6 of 1832; and that not having been conceded to him, the trial before the Law Officer is a nullity.

The first objection is chiefly founded on a supposed analogy between the case of a Judge in England and one in this country, and the inference from that analogy, that as the one is only able to try parties on charges of crimes for which a true bill has been found by the Grand Jury, so the other is only authorized by law to try a party on those charges in which he has been committed by the Magistrate; but such has never been the law or practice in this country. In the interest of justice it has always been the practice for the Courts, sanctioned by a Circular Order of the Sudder Court, to make any alterations in the calender which in the course of the trial it may seem to require. These alterations, whether they be alterations by way of the addition of an homogeneous crime *depending upon the very same evidence as the previous count in the indictment* as in the present instance, or any other sorts of amendment, should be made as early as possible. In the present case the Sessions Judge, though requested by a Counsel for the prosecution, before the trial commenced to make the additiou to the calender, refused it *then* but saw reason to order the addition *after* the evidence of the prosecutor and the witnesses to the two first counts had been recorded. This delay rendered the recording of so much of the evidence as referred to the added count necessary a second time, after the prisoner had been arraigned on it, but it did not render the making of the addition to the calendar, an act otherwise legal, illegal, and the trial held after such addition void and of no effect.

As then the Sessions Judge had the legal power to direct the addition of a count to the calendar to meet the evidence already placed before the Court, it was imperative, and not discretionary on the Magistrate to make the commitment, and as the added count contained an offence homogeneous with the other count of the indictment, and was to be proved by the same evidence, and the prisoner had entered a general plea of not guilty before the Magistrate, any proceedings before the Magistrate would have been purely formal. It is true that as a general rule before making a commitment of his own motion, the Magistrate has to take the evidence of the prosecutor and his witnesses, and also any defence which the prisoner may choose to make before him and the evidence of his witnesses, and that he must then draw up a *Roobocarree* of commitment, but the omission of any minor step, provided the *Roobocarree* of commitment be drawn out, will not in this case vitiate a trial. When, however, the commitment is directed by the Sessions Judge, all these steps become mere matters of form, and in no way essential, and though might have been followed in the present instance, their absence does not prejudice the prisoner, nor is the trial vitiated thereby, and the second objection, it seems to me, falls.

On the third objection, I would observe that on the first October 1861, the Registrar of the late Sudder Court addressed Government, requesting "that the Law Officer, who tried the case of Joykissen Mookerjee before with Mr. Lillie, might be directed *to proceed to Hooghly and to re-hear the evidence properly* taken with that officer when Mr. Lillie is prepared to take up the trial." In accordance with the request of the Court, Government, on the 7th October 1861, requested Moulvie Fyezooolah to hold himself in immediate readiness to proceed to Hooghly by *dak* at the Government ex-

pence for the purpose of sitting with Mr. Lillie, Additional Sessions Judge of that District, at the re-trial of the case of Joykissen Mookerjee ordered by the *Sudder Court.* Now it is clear, from the letter of the Registrar of the Sudder Court, that the word re-trial has crept into the Government letter by mistake, and that the Government, as requested by the Sudder Court, determined to, and did in fact, direct the Moulvie who had sat on the trial before, to proceed to Hooghly for the purpose of re-hearing the evidence when properly taken before the Additional Sessions Judge and himself. Now these words so construed are clearly an appointment of the Moulvie, who was then a Deputy Magistrate, *to complete the particular trial which as Law Officer of Hooghly he, had partially heard.* An appointment of this sort is clearly legal; for the law cited by two of my colleagues, Regulation IV of 1830, explains that neither Government nor the Nizamut Adawlut, were restricted "from especially appointing *any competent individual* of the *Mohamedan persuasion* to officiate during the Session of any Zillah or City, whenever such arrangement might, from the absence of the proper Law Officer or other cause, appear desirable or necessary, though such individual may not be regularly attached to any of the Courts of Judicature in the capacity of Law Officer, nor be at the time of such especial nomination holding any public offices under Government," follows that as in the present case Government appointed specially a competent individual of the Mohamedan persuasion, then a Deputy Magistrate, to complete the Sessions trial which he had heard as Law Officer, such appointment was legal, and the fact of his being addressed by Government as *late* Law Officer, and his signing his Futwa as former Mohamedan Law Officer of the Civil Court of Zillah Hooghly, are immaterial, and cannot vitiate an appointment otherwise legal.

The fourth objection has been so fully answered in the original Judgment on the authority of English cases as well as the practice of Indian Courts in analogous cases, that I forbear to say more on this objection and simply remark that the mere failure of a person otherwise well and properly appointed to an office to take the oaths prescribed by him before entering on the duties of that office does not initiate the acts done by him. It is for the interests of the public that they should be sustained, and the maxim *factum valet fieri non deCuit* is applicable to such a case.

On the fifth objection I would observe that the doctrine of the Sudder Court always has been that, in cases referred *for any cause* to that Court, the real trial is before it and not before the lower tribunal, that, consequently, in reason, and on legal principle, the Court has the power to direct that anything necessary to enable it to perform efficiently and thoroughly the duty which the Legislature has cast upon it should be done, and therefore, if necessary, to direct that any evidence not taken or improperly taken should be properly recorded before the Court passed its final sentence. This power is expressly recognised in Section 4, Regulation IV of 1797 as regards cases of murder and culpable homicide under Mahomedan law, and the universal practice of the Court, founded on the legal principle above stated, have extended the power to all other cases referred to it. Relying upon this practice, the Sudder Court passed the Order of Remand, which it appears to me was perfectly legal; when passing it nothing equivalent to a new trial was ordered. The Court was not changed, and the party was not re-arraigned; but simply evidence which had not been previously taken was directed to be taken. If, then, the Sudder Court had the power to remand the case with directions to the Sessions Judge to take the evidence, which ought to have been previously taken, all the arguments used as to the defendant being placed a second time in jeopardy or the offence founded on a supposed necessity for a Judgment of acquittal being passed on the record as it stood, necessarily fall. But it is contended that if all this be granted on the case going back, the prisoner, a Hindoo, was entitled under Section 5, Regulation

VI of 1832, to claim and had duly and legally claimed exemption from trial under the provisions of the Mahomedan Criminal Code, and that his trial before a Mahomedan Law Officer was consequently illegal and void.

That the prisoner was entitled to make such claim, and that he was entitled to be exempted from trial under Mahomedan law, provided he had claimed the privilege in time is undoubted. The only question is, whether he was too late or not? The words of the law are "any person, not professing the Mahomedan faith *when brought to trial* for an offence recognizable under the general Regulations, may claim exemption," &c. Now, the words *brought to trial* evidently mean when a party is first brought to trial and arraigned, and a claim to exemption should, under these terms and in accordance also with the English system, be made immediately after arraignment, and before the trial has commenced. This Joykissen Mookerjee failed to do. The Sudder Court in its Judgment of the 14th December 1861 remarked—"Had Joykissen Mookerjee so "objected in the present case, his case would have never reached this Court as a referred "case, but would have been at once decided by the Judge, and would only have come "before it in appeal. So far from objecting, however, to be tried by the Mahomedan "Law Officer, Joykissen Mookerjee entered into a defence before that officer on all "the counts of the indictment, including the third, for the taking of evidence upon "which the case had been remanded and called evidence in support of that defence; "such being the case, a mere remand for taking evidence does not get rid of his pre-"vious acts, and his assent to be tried by the Law Officer to be implied therefrom, so as to "entitle him now to claim exemption from trial under the provisions of the Mahome-"dan Criminal Law; and though it will be necessary that the defence previously entered "upon, and the evidence already taken after the evidence of the prosecutor has been "duly recorded on the third count of the indictment be retaken, and so far that de-"fence recorded becomes as if it had never been taken, still in the particular form, in "which the trial commenced and came up to this Court (it being no new trial, but a "continuation of the old one) it must be continued, and no variation can at this "particular stage of the case, either under the particular law cited, or on any principle "of law, be admitted." This reasoning seems to me to be sound, and to it I adhere: and I am, therefore, of opinion that the fifth head of objection taken up by the Counsel of Joykissen Mookerjee fails.

For the reasons then, given above, I am of opinion that no material irregularities of procedure have occurred in Joykissen Mookerjee's trial when it is considered with reference solely to the law of procedure in Bengal, and consequently that he has been no way prejudiced in his defence by any irregularities of procedure.

As to the question put by Government, *viz.*, whether doubt has been cast on the real guilt of the prisoner, I would observe that the papers before me disclose nothing on this head which was not before the Sudder Court at the trial, except the expressed opinion of Mr. Peterson and Mr. Newmarch, the Counsel, for the prisoner, as to the innocence of their client. That opinion, as one of the Judges who tried the case, I decline, for obvious reasons, to take into my consideration, but on a reconsideration of the evidence, both direct and indirect, produced at the trial, and of that alone, I remain of opinion that the verdict at which the Sudder arrived was a just one; that the view adapted by the Court was the only one which satisfactorily accounts for all the facts of the case; that no reasonable doubt can exist as to the real guilt of the prisoner; and that, consequently, there is not the slightest ground for disturbing at the present moment the sentence passed upon him by the late Sudder Court.

(Signed.) C. B. TREVOR.

The 17th January, 1863.

The Hon'ble the Lieutenant Governor of Bengal requests that the Judges of the High Court will have the goodness to favor the Lieutenant Governor with such remarks as they (or any of them) may desire to make on the papers forwarded with his Secretary's letter on this case, and also to furnish His Honor with their opinion as to whether, with reference to all the circumstances of the case, and especially to the Judgment of the Judicial Committee of the Privy Council, and the opinion of the Lord President, as conveyed in Mr. Reeves's letter of the 30th of July, there is ground for pardoning the prisoner, or for remitting the remainder of his punishment.

We have thus before us:—

1*st.*—The letter of the Right Hon'ble the Secretary of State to His Excellency the rnor General of India in Council, desiring His Excellency to consider "whether s is not a proper case for the exercise of the power vested in His Excellency under t XVIII. of 1855, if His Excellency shall be of opinion either that doubt has been "cast on the real guilt of the prisoner, or that the prisoner was prejudiced in his defence "by the irregularities of procedure, to which their Lordship's intimation is directed."

2*nd.*—Next we have the Judgment of the Judicial Committee of Her Majesty's Privy Council, which records two propositions,—first, "Whether, as has been argued, "there exists on behalf of the Crown a prerogative right of appeal even in matters of "criminal jurisdiction; and *secondly*, whether this is a proper case in which the autho- "rity of the Crown should be enterposed for the purpose of doing justice."

On the first of these propositions Her Majesty's Privy Council hold that the right of appeal exists, but they refuse that appeal on grounds which involve that the Privy Council do not, and will not, investigate the facts or evidence at all.

On the second point the Privy Council avowedly, not having judicially considered the facts and evidence, nor having stated on what particular legal objection the Nizamut Adawlut was wrong in law, make the following remarks:—"With regard to the "merits of the case itself their Lordships certainly are inclined to come to the conclusion "that justice has not been well administered on the present occasion."

"These are the reasons which operate upon our minds in rejecting this application, "not at all forgetting that injustice may have been done in this individual case, and not "at all forgetting that the power of the Crown may be invoked in another shape, and "that, that injustice may be remedied. Their Lordships are of opinion, that they can- "not under the existing circumstances, advise Her Majesty to admit this right of appeal; "but they doubt not that justice will be done because they would suggest that an "application should be made to the constituted authorities who have the power to afford "remedy, though in a different way. They doubt not that, when it is represented to "those authorities that this suggestion emanates from the Judicial Committee, they "will not be loath to examine into the circumstances of the case, and to do that whic' "justice may require."

3*rd.*—The next document is the letter of the Lord President in which His Lordsl desires especially to call the attention of the Secretary of State for India in Council that portion of the Judgment of the Privy Council above cited, and "is satisfied that du "weight will be given in the proper quarter to the opinion which has been thus expresse "by their Lordships."

4*th.*—The application for the pardon of the prisoner is enclosed for our consideration. That application states—"the main grievances, as *respects procedure*, of which "the Petitioner complains may be briefly stated as follows:—*first*, that he was tried "upon a charge upon which he was never legally committed; *second*, that a retrial was

directed when he was legally entitled to be acquitted for want of evidence to support "the charge; and *third*, that when he was retried his right, as a Hindoo, to be exempt "from trial under the provisions of the Mahomedan Criminal Code, though duly "claimed, was disallowed; and had his claim been allowed, the decision of the European "Judge in his favor would have been final and conclusive."

5th.—The opinions of the learned Counsel who appeared before Her Majesty's Privy Council for the prisoner are also forwarded to us. They state, "having been "Counsel for the defendant in the argument before the Privy Council, we beg permis- "sion to state that, in our opinion, the defendant was entitled to have had the judgment "and sentence quashed; and that, if an appeal had been permitted by the Judicial "Committee, the conviction would have been quashed."

My learned colleagues have all seen these papers before Mr. Trevor and I have, and rightly so, as the prisoner has, thus the benefit of any doubt which their comments may give rise to in our minds as to the justice of our decision in this case. The only exception to this (which is also a right exception) is that I have not seen the remarks of the learned Judge who presided with me at the trial (Mr. Justice Trevor.)

On a consideration of all these papers, I find that to do the prisoner justice, I must ask myself—

1st.—Should the prisoner be pardoned because there is any doubt of his guilt?

2nd.—Should he be pardoned because there is any doubt of the substantial legality and complete fairness of his trial, *viz.*, has he been prejudiced by the procedure?

3rd—Should he be pardoned because the Privy Council recommended the question of the propriety of his pardon to the consideration of the Executive?

Before answering these questions, I need scarcely say that I have carefully considered the remarks of my colleagues.

Having done so, and reconsidered our Judgment, I must answer the first question in the negative. Her Majesty's Privy Council do not give any opinion that the Nizamut Adawlut were wrong in the facts, or that the evidence was insufficient for a conviction; nor do any of my learned colleagues express any opinion that the presiding Judges were wrong upon this point. The presiding Judges heard the evidence and comments upon it by learned Counsel for some days, and for myself I can only say that I have no doubt that the prisoner was guilty of causing a Pottah to be forged, and that there was sufficient legal evidence to sustain conviction. The reason in detail are to be found in our Judgment, and it is, therefore, needless to repeat them here. I will only make one remark on an objection raised in the Petition before the Privy Council, namely, that it was most improbable that a man of the wealth and intelligence of the prisoner would have risked his character and liberty for the profit of one hundred Rupees per annum. But I think the facts proved in evidence show that the object in view was not the gain or loss of one hundred Rupees, but to overpower refractory opponents and a very hostile relative who supported them, and to prevent *any* interference in a property contiguous to the prisoner's own.

To the second question I must also give a negative reply. I do not wish to make comments upon the remarks of my learned colleagues; but it is necessary distinctly to observe that in this case the law which governed, and rightly governed, the trial was Regulation law and practice settled by decisions according to that law. Further, the presiding Judges held, according to that law and practice, upon the question of the legality of the addition of the third count, and of the order of remand and of the Law Officer sitting at the trial, that there was no new trial but one continuous trial on a

...nner of revision over law and legal practice have always recognised. ...ulation IX. of 1793 gives full power to the Nizamut Adawlut in respect ...d issuing orders upon such revision in referred cases and in appeal cases in ... department. These orders of revision may involve an amended proce- ...ditional evidence but preserve still a continuous trial.

...he legal practice, as our own experience teaches, and precedents will show, is in ...ordance with this law.

In this place I would remark that I am clearly of opinion as to the objection that the prisoner had not another trial before the Magistrate when the third count was added, that he was in no way prejudiced by this. If he thought that he was deprived of any benefit he might then, if he desired it, have claimed it; he had the same Counsel at that time as now and throughout.

As far as regards the objection regarding the sitting of the Mahomedan Law Officer on this trial I have not a doubt that his official status as Law Officer was not abrogated by his doing duty as a Deputy Magistrate elsewhere in the interval between the commencement of the trial and his sitting again to complete it in fulfilment of our order of remand. Indeed, the question of the future employment of Mahomedan Law Officers necessarily arose just then, and only just then, inasmuch as the new criminal procedure about to take effect would not require their services, but might require their being provided with employment elsewhere, except when, as here, they were wanted to complete trials which they had commenced. Thus, too, there could be no precedent for ... appointment (the absence of which precedent is noticed) because there had been no immediate question before of the necessity of abolishing Law Officers. What in effect did the criminal procedure law in force at the time of the trial contemplate? It was this, namely, that a Hindoo might, at the commencement of his trial, demand exemption from being tried by a Mahomedan Law Officer. The prisoner did not do this. On the contrary, at that time, he acquiesced in being tried by such an Officer, but before the trial was completed by fulfilment of the remand order of the Nizamut Adawlut, and after the Law Officer's verdict was found to be against the release of the prisoner, then and then for the first time did he claim the exemption, that is, at a time when (not by any ruling of ours only) but by the law which gave the prisoner the claim to exemption at all, it was too late.

As to the Law Officers not being resworn, I am of opinion that the sanction of an oath which had been (admittedly) duly taken when the trial commenced fully bound the Law Officer till the trial was completed, that is till it was completed by fulfilment of our order of remand.

In this view I must say that I see no prejudice to the prisoner in any part of the procedure. The record shews that he throughout shaped his defence and proceedings as he would have done under the same circumstances as those now before us.

The third question is, I submit, one which it is solely for the Executive properly to answer. As I above stated I see no reasons on *judicial* ground to recommend a pardon or remission of the sentence. If the Executive Government thinks that the sentiments expressed by Her Majesty's Privy Council on the wealth, intelligence and social position or other personal circumstances of the prisoner or other reasons not of a judicial character authorised the exercise of the prerogative, the Executive can of course act as it thinks best and as the law allows, but if it consults the Judges on judicial grounds, on which alone it is for them to base their opinion, I can see no such grounds for the pardon of the prisoner. Should the Executive pardon Joykissen Mookerjee, the case of P... ...ose is, I submit, a matter for consideration.

O

I have merely to add that I only received the papers this mo. Hon'ble the Lieutenant Governor is pressing for an answer, I think make these few remarks, and to refer to our Judgment fo fuller details the return of the papers.

(Signed) H. V. BAYL

The 19th January 1868.

J. A. Monnier, Hurkaru Press Limited.